Asylum, Withholding, and Convention Against Torture

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This outline is a companion to the training on asylum, withholding and Convention Against Torture provided by Charles Adkins-Blanch, Vice Chairman of the Board of Immigration Appeals, and Karen Hope, Staff Attorney at the Board of Immigration Appeals. It is also a reference guide; the authors' views expressed herein do not necessarily represent the views of the Board of Immigration Appeals, the Executive Office for Immigration Review, or the Department of Justice.

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A. Sources of Law

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B. What is a Refugee?

INA § 101(a)(42)(A) – defines a refugee as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country, because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

INA § 101(a)(42)(B) – provides that a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion.

1. The statute superseded *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989) (holding that China's one-child policy is not facially persecutory and does not create a well-founded fear of persecution on account of an enumerated ground).

   Matter of J-S-, 24 I&N Dec. 520 (A.G. 2008) (holding that section 101(a)(42) of the Act does not confer automatic or presumptive refugee status on a spouse of a person who has been subjected to a forced abortion or sterilization).

   a. However, a person may establish he qualifies as a refugee on account of a well-founded fear of persecution because he will be subjected to forced sterilization or will be persecuted for not undergoing such a procedure, or will be persecuted for "other resistance" to a coercive population control program.

   b. *Matter of J-S-* overruled *Matter of S-L-L-*, 24 I&N Dec. 1 (BIA 2006), and *Matter of C-Y-Z-*, 21 I&N Dec. 915 (BIA 1997), which granted refugee status to spouses of people who had been subjected to a forced abortion or sterilization.

3. *Matter of M-F-W- and L-G-*, 24 I&N Dec. 633 (BIA 2008) (holding that removal of an IUD or failure to attend mandatory gynecological appointments may constitute "other resistance," but that, absent some aggravating circumstance, the insertion or reinsertion of an IUD ordinarily will not constitute "past persecution" on account of that "other resistance").

   The circuit courts that have addressed this issue have deferred to the Board's interpretation that forced insertion of an IUD alone does not constitute persecution. *See, e.g.*, *Liu Jin Lin v. Holder*, 723 F.3d 300, 306 (1st Cir. 2013); *Mei Fun Wong v. Holder*, 633 F.3d 64 (2d Cir. 2011) (agreeing with the Board's criteria but remanding to determine the scope of "aggravating circumstances"); *Fei Mei Cheng v. Att'y Gen. of U.S.*, 623 F.3d 175, 191-92 (3d Cir. 2010) (stressing that although a single IUD insertion may not constitute persecution, the cumulative harm from a series of instances may be sufficiently abusive to constitute persecution); *Li Fang Lin v. Mukasey*, 517 F.3d 685, 692-97 (4th Cir. 2008) (remanding to determine whether forced sterilization *and* mandatory continued usage of an IUD can constitute persecution).

II. The Real ID Act of 2005

A. Purpose and Effective Dates[1]

1. Protecting national security and amendments to asylum and terrorism provisions of the Act.
2. *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006) (asylum applications filed on or after May 11, 2005, are subject to the REAL ID Act, whether filed with DHS asylum officer or Immigration Court).

B. Substantive Changes to Asylum and Withholding of Removal

1. Nexus is "at least one central reason" for fear of persecution

   INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007). **NOTE**: *Barajas-Romero v. Lynch*, 846 F.3d 351, 358-60 (9th Cir. 2017) (aliens requesting W.o.R. need only demonstrate that one of the five protected grounds was or will be "a reason" for the persecution.
2. Credibility determination—new "totality of the circumstances" standard — INA § 208(b)(1)(B)(iii); *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007).
   a. Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility

[1] Cited as Div. B. of Pub. L. No. 109-13, 119 Stat.231 (2005).

of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility; however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal. INA § 208(b)(1)(B)(iii).

b. Inconsistencies need not "go to the heart of" applicant's claim. Although any discrepancy may be considered, material inconsistencies are given more weight in the "totality of the circumstances" analysis.

c. Circuit courts have addressed the potential application of the legal doctrine *falsus in uno, falsus in omnibus* ("false in one thing, false in everything") after the passage of the REAL ID Act. *See, e.g., Quezada-Caraballo v. Lynch*, 841 F.3d 32, 33 (1st Cir. 2016). There is a circuit split regarding whether the doctrine applies in the context of the REAL ID Act. *Compare Quezada-Caraballo v. Lynch*, *supra*, *and Enying Li v. Holder*, 738 F.3d 1160, 1163 (9th Cir. 2013) *with Kadia v. Gonzales*, 501 F.3d 817, 821-22 (7th Cir. 2007). There is a further circuit split regarding whether the Board, in addition to Immigration Judges, may also use the doctrine in making credibility determinations regarding evidence presented to the Board. *Compare Qin Wen Zheng v. Gonzales*, 500 F.3d 143, 147 (2d Cir. 2007) *with Shouchen Yang v. Lynch*, 822 F.3d 504, 508-09 (9th Cir.) 2016). For more information on the *falsus in uno, falsus in omnibus* doctrine, *see* Alexandra Fleszar, *Finding Firm Ground: Exploring the Limits of Adverse Credibility*, 11 (no. 3) Imm. L. Advisor 1 (Mar.-Apr. 2017).

3. Corroboration standard—INA § 208(b)(1)(B)(ii)

a. IJ may request corroboration in determining if the burden of proof is sustained, even where he finds the applicant's testimony credible but unpersuasive or where the testimony does not to refer "to specific facts sufficient to demonstrate that the applicant is a refugee."

b. Corroborating evidence must be provided or its absence reasonably explained for applicant to meet burden of proof.

Note—Circuit courts have split as to whether and how much notice and opportunity an IJ must provide to an otherwise credible alien to either produce corroboration or explain its unavailability.

Must Provide Notice:

- **Ninth Circuit**: If the applicant's credible testimony alone does not meet the applicant's burden of proof, the IJ must give the applicant notice of the corroboration that is required and an opportunity to either produce the requisite corroborative evidence or explain why the evidence is not reasonably available. *Ren v. Holder*, 648 F.3d 1079, 1093 (9th Cir. 2011). The Ninth Circuit found that the IJ must identify the evidence necessary and grant a continuance for the respondent to obtain it. *Id.*; *see also Lai v. Holder*, 773 F.3d 966, 975-76 (9th Cir. 2014) (citing *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1094 (9th Cir. 2014)) (*Ren* applies when the IJ finds that the respondent is not credible).
- **Third Circuit:** Three-part "*Abdulai* inquiry": (1) an identification of facts for which it is reasonable to expect corroboration; (2) an inquiry as to whether the applicant has provided information corroborating the relevant facts; and, if the applicant has not provided this corroboration, (3) the IJ must analyze the adequacy of applicant's explanation for its absence. *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001) (Pre-REAL ID); *see also Toure v. Att'y Gen. of U.S.,* 443 F.3d 310, 324–25 (3d Cir. 2006) (Pre-REAL ID) (IJ must provide the opportunity to seek the evidence or provide an explanation for its absence); *Chukwu v. Att'y Gen. of U.S.,* 484 F.3d 185, 191–92 (3d Cir. 2006) ("[T]he REAL ID Act does not change our rules regarding the IJ's duty to develop the applicant's testimony, and in particular, to develop it in accord with the *Abdulai* steps."); *Saravia v. Att'y Gen.of U.S.*, 2018 WL 4688710, at *7 (3d Cir. Oct. 1, 2018) (reaffirming the "*Abdulai* 3-part inquiry" and rejecting the BIA's precedent decision *Matter of L-A-C-* (see below) as "inconsistent with the law of this Circuit").

Notice Not Required:

- **Seventh Circuit:** The language of the REAL ID Act puts respondents on notice because it "clearly states" that corroborative evidence may be required. *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008); *see also Darinchuluun v. Lynch*, 804 F.3d 1208 (7th Cir. 2015); *Abraham v. Holder*, 647 F.3d 626, 633 (7th Cir. 2011). Note that corroborating evidence will not be required if the applicant does not have, and cannot reasonably obtain the evidence. *Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015) (holding corroboration to be unreasonable where those needed to provide it were indifferent, had been threatened not to assist, or lacked personal knowledge, and where country reports, if provided, would at most prove only that the claim was plausible).
- **Second Circuit:** The REAL ID Act is ambiguous on the issue of notice and the BIA's interpretation that no notice is required is reasonable and entitled

to *Chevron* deference. *Wei Sun v. Sessions*, 883 F.3d 23, 26 (2d Cir. 2018). "The alien bears the ultimate burden of introducing such evidence without prompting from the IJ." *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009) (Pre-REAL ID). *But see Yan Juan Chen v. Holder,* 658 F.3d 246, 253 (2d Cir. 2011) (noting that "importantly" the IJ "identified the necessary corroborating evidence nine months in advance of [the respondent's] hearing, allowing her an opportunity to secure [the evidence] or explain why it was not available") (citing *Ming Shi Xue v. BIA*, 439 F.3d 111, 112 (2d Cir. 2006) (Pre-REAL ID)).

- **BIA follows 2d and 7th Circuits**—in *Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015), the Board held that an IJ should consider an applicant's explanations for not providing corroborating evidence and, if a continuance is requested to obtain such evidence, he should determine whether there is good cause to continue proceedings; however, an IJ is not required to continue proceedings or even identify what specific evidence is necessary to meet the respondent's burden of proof. The Seventh Circuit's decision in *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015), cited the Board's decision in *Matter of L-A-C-*.
- **Sixth Circuit**: In an opinion issued after *Matter of L-A-C-*, *supra*, the Sixth Circuit agreed with the Seventh Circuit and disagreed with the Ninth Circuit that the Act does not entitle an alien to any notice of what sort of corroborating evidence the alien must produce to carry his burden. *See Gaye v. Lynch*, 788 F.3d 519, 528-30 (6th Cir. 2015).
- **Considered and Remanded to the Board: First Circuit:** In *Guta-Tolossa v. Holder*, 674 F.3d 57, 64 (1st Cir. 2012), the First Circuit recognized the circuit split, but found there is a threshold issue of "whether the IJ must explicitly find an applicant's testimony 'otherwise credible' on the record, or whether such a finding may be inferred from the whole of the IJ's decision." The First Circuit remanded to the Board to resolve in the first instance. The Board remanded to the Immigration Judge for the consideration of further evidence.

III. Standard of Review

A. Regulation - 8 C.F.R. § 1003.1(d)(3)

1. *Board reviews facts determined by an IJ for clear error*

   a. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v.*

United States Gypsum Co., 333 U.S. 364, 395 (1948).

b. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 537-74 (1985).

2. Board reviews de novo questions of law, discretion, judgment, and all other issues in appeals from IJ decisions.

   a. De novo means "anew." BLACK'S LAW DICTIONARY (10th ed. 2014).

   b. The Board basically owes no deference to the IJ's decision and looks at the issue with fresh eyes.

B. Clear Error Review - Examples

1. Credibility. *See* 8 C.F.R. § 1003.1(d)(3).

2. Predictive findings of what may occur in the future. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 586 (BIA 2015).

3. Applicant's residence in another country prior to applying for asylum. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011) (citing *Sall v. Gonzales*, 437 F.3d 229 (2d Cir. 2006)).

4. Nature of applicant's criminal activities, family ties, employment history, etc.

5. Applicant's intent in making a false statement – i.e., whether the fabrication was knowing or deliberate. *Matter of Y-L-*, 24 I&N Dec. 151, 159 (BIA 2007); *Flores v. Holder*, 699 F.3d 998, 1004 (8th Cir. 2012).

6. Motivations of persecutor. *Matter of D-R-*, 25 I&N Dec. 445, 453 (BIA 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 127-28 (4th Cir. 2011).

7. Content of foreign law. *Matter of A-G-G-*, 25 I&N Dec. 486, 505 n.19 (BIA 2011).

8. Whether an asylum applicant could safely relocate internally. *See Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303, 1311 (11th Cir. 2013); *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008).

   Ninth Circuit has not determined whether internal relocation is a legal or factual question, citing conflicting Board precedent in *Matter of D-I-M-* and *Matter of A-S-B-*. *See Brezilien v. Holder*, 569 F.3d 403, 413 (9th Cir. 2009). However, *Brezilien* was issued prior to the Board's recent holding in *Matter of Z-Z-O-*, which overruled *Matter of A-S-B-*.

9. Whether a government is unable or unwilling to protect. *Crespin-Valladares v. Holder*, 632 F.3d 117, 128-29 (4th Cir. 2011); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007).

10. Whether a person had knowledge of something. *See Matter of D-R-*, 25 I&N Dec. 445, 454-55 (BIA 2011) (affirming the IJ's finding that the applicant

knew or should have known that captured Bosnian Muslims would face mass execution or a similar fate).

11. Whether terrorist acts were authorized by an entity's leaders for purposes of determining whether an entity if a Tier III terrorist organization.

    a. The Third Circuit held that "as long as an agency finds as a matter of fact that the allegedly terrorist acts were authorized by [BNP] party leaders, we will accept that finding as long as it is supported by substantial evidence." *Uddin v. Att'y Gen*., 870 F.3d 282, 292 (3d Cir. 2017) (emphasis added). The Ninth Circuit has held that the record reasonably supports the BIA's finding that "the ELF falls within the broad statutory definition of a 'Tier III' terrorist organization." *Haile v. Holder*, 658 F.3d 1122, 1127-28 (9th Cir. 2011).

    b. Note: The standard of review re whether an entity is a Tier III organization is not clear. In *Matter of S-K-*, the Board held that "we find no error in IJ's conclusion that the CNF is a terrorist organization within the definition of the Act." 23 I&N Dec. 936, 941 (BIA 2006). It is not clear if that is clear error or de novo review.

C. De Novo Review – Examples

1. Whether the level of harm constitutes "persecution."[2]
2. Whether the applicant has an objectively reasonable fear of future persecution. *Matter of Z-Z-O-,* 26 I&N Dec. 586, 586 (BIA 2015).
3. Whether the applicant is firmly resettled. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).
4. Discretionary determination.
5. Whether a proposed group is a cognizable PSG. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390 (BIA 2014) (although whether an applicant is an actual member of the PSG is a finding of fact reviewed for clear error. *Id.* at 391).
6. Whether a misrepresentation is material. *Matter of Y-L-*, 24 I&N Dec. 151, 159 (BIA 2007); *see Luciana v. Att'y Gen. of U.S.*, 502 F.3d 273, 280 (3d Cir. 2007) (concluding the IJ's determination that a false statement was not

[2] Note: Some circuits have applied a more deferential "substantial evidence" standard of review, reserved for findings of fact, to the lower courts' findings of past persecution. The Tenth Circuit recently discussed its precedent on considering persecution as a question of fact, and pointed out that such an analysis is at odds with Board precedent. *Xue v. Lynch,* 846 F.3d 1099, 1104 (10th Cir. 2017) (collecting cases at n. 11), *docketing petition for cert. sub nom. Xue v. Sessions*. The parties did not actually raise this issue on appeal, and the Court ultimately did not address it. *Id.* "[T]he ultimate determination whether an alien has demonstrated persecution is a question of fact, even if the underlying factual circumstances are not in dispute and the only issue is whether those circumstances qualify as persecution." *Vicente–Elias v. Mukasey,* 532 F.3d 1086, 1091 (10th Cir. 2008) (emphasis added).

material to be "erroneous as a matter of law").

7. Whether extraordinary circumstances excuse a delay in filing an asylum application. *See Husyev v. Mukasey*, 528 F.3d 1172, 1178-79 (9th Cir. 2008) (finding that the issue of extraordinary circumstances presents a question of law where the issue is whether established facts satisfy the legal standard).

8. Whether an applicant has established a basis for humanitarian asylum based on the severity of past persecution. *See Matter of N-M-A-*, 22 I&N Dec. 312, 325-26 (BIA 1998) (After a determination of past persecution has been made, the "compelling reasons" legal standard is applied to determine whether severe past persecution exists under 8 C.F.R. § 208.13(b)(1)(iii)(A)).

9. Whether an applicant has engaged in the persecution of another. *See Quitanilla v. Holder*, 758 F.3d 570, 577 (4th Cir. 2014) ("In assessing the applicability of the persecutor bar, we accept the IJ's factual determinations. Our review of the final BIA decision is thus limited to the issue of whether, under the facts found...by the IJ, [the respondent] assisted or otherwise participated in the persecution of individuals."); *Suzhen Meng v. Holder*, 770 F.3d 1071, 1073 (2d Cir. 2014) ("We apply de novo review, however, to questions of law, including whether an alien's conduct could render her a "persecutor" as that term is statutorily defined.").

D. Mixed Questions of Law and Fact – Example

1. Government acquiescence. *See, e.g., Myrie v. Att'y Gen.*, 855 F.3d 509 (3d Cir. 2017). *But see, e.g., Saintha v. Mukasey*, 516 F.3d 243 (4th Cir. 2008) (holding that government acquiescence is a finding of fact, which the circuit court reviews for substantial evidence); *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir. 2003) (discussing the interpretation of the term "acquiescence" in 8 C.F.R. § 208.18).

IV. Basic Elements and Burdens of Proof

A. Asylum Standard and Overview of Elements

1. The asylum standard is "more generous" than the withholding of removal standard. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (noting that an alien need only show that her removal would create a "reasonable probability"—as low as a 10% chance—of persecution).

2. The harm feared or experienced must "rise to the level" of persecution. Actual harm is generally required to establish past persecution; threats of harm and/or brief periods of detention usually will not suffice. *See, e.g., Baharon v. Holder*, 588 F.3d 228, 232 (4th Cir. 2009) ("A key difference between persecution, as required to support an asylum application, and less-severe mistreatment is that the

former is systematic while the latter consists of isolated incidents."); *Kazemzadeh v. U.S. Att'y Gen.*, 577 F.3d 1341, 1353 (11th Cir. 2009) ("Minor physical abuse and brief detentions do not amount to persecution."); *Hoxha v. Ashcroft*, 319 F.3d 1179 (9th Cir. 2003) (finding that harassment, threats, and one beating did not constitute persecution); *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998) ("[Persecution] requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty."); *see also Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005). *But see*, *e.g., Escobar v. Holder*, 657 F.3d 537, 544 (7th Cir. 2011) ("Threats can constitute persecution, if they are immediate, menacing, or the perpetrators attempt to follow up on them.") (citing *Nzeve v. Holder*, 582 F.3d 678, 683 (7th Cir. 2009)).

a. The harm feared can be economic; however, economic persecution requires "substantial economic disadvantage that interferes with the applicant's livelihood." *He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014) (internal quotations omitted).

b. For economic harm, the Board applies a more stringent standard than the Ninth Circuit. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007) (concluding that non-physical harm may qualify as persecution if it is a deliberate imposition of *severe* economic disadvantage or deprivation of liberty, food, housing, employment, etc.).

3. Protected grounds—Race, religion, nationality, particular social group, and political opinion. These grounds are discussed further in the "Highlights of Caselaw" section of this outline. Note: All grounds may be imputed. *See Matter of N-M-*, 25 I&N Dec. 526 (BIA 2011).[3]

4. Nexus requirement—Persecution must be "on account of" a protected ground.

a. Under the REAL ID Act, the respondent must show that the protected ground is "one central reason" for the persecution. REAL ID Act of 2005, §§ 101(a)(3), 101(c).

b. Political opinion: Persecution must be on account of the *victim's* political opinion, not the persecutor's. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

c. The Board has held that a persecutor's motive is a matter of fact (i.e., subject to clear error review). *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214

[3] In *Lkhagvasuren v. Lynch*, 849 F.3d 800, 803 (9th Cir. 2016), the Ninth Circuit assumed without deciding that the *Matter of N-M-* framework may be applied for the purpose of identifying whether an applicant has established the requisite factual nexus between any purported political whistleblowing and actual persecution as those terms are defined in the REAL ID Act. In doing so, the Ninth Circuit held that the alien failed to establish that whistleblowing against his employer amounted to persecution.

(BIA 2007).

5. "Unable or unwilling to control"—Persecution must be inflicted by either a government actor or a private actor whom the government is unable or unwilling to control. *See Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980) (clarifying that a government's "difficulty" controlling a private actor does not equate to the government's inability to do so).

   a. Common examples of non-governmental actors: gangs, common criminals, militias or other non-regular forces, guerillas or other rebel groups, violent religious or sectarian organizations, particularly powerful individuals.

   b. Constructing one standard definition for the terms "unable" and "unwilling" has been challenging. *See Urbina-Dore v. Holder*, 735 F.3d 952, 954 (7th Cir. 2013) ("The Board has used the 'unwilling or unable to control' formula since 1964 yet has never attempted to quantify just how far a nation may depart from perfect law enforcement without being deemed complicit in private crimes.").

   c. Some decisions focus on government complicity with or condonation of private acts. *See, e.g.*, *Barsoum v. Holder*, 617 F.3d 73, 79 (1st Cir. 2010) ("The state must . . . be implicated, whether by participation or acquiescence, for harm to amount to persecution.") In other cases, evidence of widespread corruption or unwillingness to prosecute may be sufficient. *See, e.g.*, *Sarhan v. Holder*, 658 F.3d 649, 659 (7th Cir. 2011) ("The legal regime and the minimal punishments that result mean that the Jordanian government at best does almost nothing and at worst promotes the practice of honor killings . . . [indicating] "'a widespread unwillingness to recognize the abuse involved or take action against the problem.'").

   d. To establish government's inability to control, the respondent "must show more than 'difficulty controlling' private behavior." *De Castro-Gutierrez v. Holder*, 713 F.3d 375, 381 (8th Cir. 2013) (denying the petition for review where the respondent provided evidence that rebels carried out violent acts in Colombia but failed to show that the government condoned such violence or "demonstrated a complete helplessness to protect the victims"); *see also Saldana v. Lynch*, 820 F.3d 970 (8th Cir. 2016) (same and also noting that CAT doesn't require a crime-free society); *Canahui v. Lynch*, 642 F. App'x 745, 747 (9th Cir. 2016) ("Refusing to provide aid because of a 'lack of financial and physical resources' shows that the police were unable to control the persecution.") (citing *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010)).

   e. Government efforts to control bad actors do not necessarily show ability

to control. *See, e.g.*, *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2013) (holding that the court must consider the efficacy of the government's efforts).

f. Specific facts of the case will control. *Compare Khattak v. Holder*, 704 F.3d 197, 206 (1st Cir. 2013) ("[While] military action indicates that the Pakistani government is willing to take on the Taliban, such action does not show that the . . . government is able to protect its citizens from Taliban attacks.") *with Khan v. Holder*, 727 F.3d 1, 8 (1st Cir. 2013) ("[T]he evidence shows that the Pakistani government has actively sought to protect Khan from the Taliban and that it has been to some extent successful in controlling the Taliban [in his home region], even if it has not eradicated the threat the Taliban poses.").

g. Unwillingness can be shown through corruption or inaction in the face of significant violence. *See, e.g.*, *Pan v. Holder*, 777 F.3d 540 (2d Cir. 2015) (finding the IJ and Board erred in ignoring evidence that the police were corrupt and would not help protect the applicant from prosecution).

h. Unwillingness to intervene - *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007) - The Second Circuit remanded to the Board to consider testimony that several days after alien's kidnapping by the FARC, she filed a complaint with local authorities, but they did not give her complaint "much importance" because she was "just a civilian person" and also a country conditions report that the government, "[w]ith the stated goal of furthering peace talks," had allowed the FARC "to maintain control over a Switzerland-sized area" of the country. *Id.* Need to consider evidence that the Columbian government acquiesced to FARC's control over large swath of land and did not investigate her claim.

i. Nexus between a statutorily protected ground and the government's inability or unwillingness to control is not necessary. *Doe v. Holder*, 736 F.3d 871 (9th Cir. 2013). The only nexus requirement is that the actual persecutors, whether governmental or nongovernmental, act on a protected ground.

j. The arrest of an actor for acts unrelated to the persecution at issue is insufficient to demonstrate willingness to protect. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 952 (4th Cir. 2015).

k. Some courts have held that the alien need not report the persecution if doing so would be futile or might subject him to further abuse. *See, e.g.*, *Vitug v. Holder*, 723 F.3d 1056, 1065 (9th Cir. 2013) (holding that the lack of reporting was excusable because the respondent established that police in the Philippines were known to harass gay men and "turn a blind eye to hate crimes"). For other examples that considered that the

individual had not contacted the police, *see also Mulyani v. Holder*, 771 F.3d 190 (4th Cir. 2014) (holding that the respondent did not show government inability or unwillingness, as the respondent never notified police or other government officials, and the attackers "did not consider themselves free to assault her with impunity"); *Almutairi v. Holder*, 722 F.3d 996 (7th Cir. 2013) ("[B]ecause he never mentioned the threatening calls to anyone in the Kuwaiti police or military, he could only speculate that the Kuwaiti government might not protect him if he did seek its help.").

NOTE: *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017) (overruled its prior decision in *Castro-Martinez v. Holder*, which held that for a past persecution claim in which the alien did not report the harm, the respondent bears the burden to "fill in the gaps" regarding how the government would have responded).

6. Discretionary Considerations—Asylum is discretionary, unlike withholding of removal. *See* 8 C.F.R. § 1208.13(b)(1)(i). Although a respondent may satisfy the other requirements for the asylum claim, the individual must warrant a positive discretionary determination. *See e.g.*, *Junming Li v. Holder*, 656 F.3d 898 (9th Cir. 2011) (upholding the IJ's denial of asylum in an exercise of discretion where the alien's manner of entry into the United States, namely being concealed in a metal box welded to the bottom of a car in the desert heat, was so dangerous that to grant asylum would encourage others to also risk their lives).

   a. Favorable discretionary factors for asylum applicants include: (1) family ties within the United States; (2) residence of long duration in United States; (3) evidence of hardship to alien and family if deportation occurs; (4) service in this country's armed forces; (5) history of employment; (6) existence of property or business ties or evidence of value and service to the community; (7) proof of genuine rehabilitation if a criminal record exists; (8) evidence attesting to the alien's good character (i.e., affidavits from family, friends, and responsible community representatives); (9) general humanitarian reasons, such as age or health; and (10) evidence of severe past persecution or well- founded fear of future persecution. *See, e.g.*, *Zuh v. Mukasey*, 547 F.3d 504, 510-11 (4th Cir. 2008); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1387 (7th Cir. 1987) (citing *Matter of Marin,* 16 I&N Dec. at 584-85).

   b. Adverse discretionary factors include: (1) the nature and underlying circumstances of the exclusion ground at issue; (2) presence of additional significant violations of immigration laws; (3) the existence of a criminal record and if so, its nature, recency, and seriousness; (4) lack of candor with immigration officials; and (5) any other evidence indicative of bad character or undesirability for permanent residence. *See, e.g.*, *Zuh v.*

Mukasey, 547 F.3d 504, 511 (4th Cir. 2008); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1387 (7th Cir. 1987) (citing *Matter of Salim,* 18 I & N Dec. 311 (BIA 1982)).

c. If asylum is denied as a matter of discretion but withholding of removal is granted, reconsideration is required. 8 C.F.R. § 1208.16(e); *see Shantu v. Lynch*, 654 F. App'x 608 (4th Cir. 2016) (noting the regulation's ambiguity regarding whether the IJ or Board must conduct this reexamination and at what point such reconsideration should occur, and remanding where the agency did not properly address the factors articulated in *Zuh*, 547 F.3d at 510-11 (4th Cir. 2008)).

d. Factors to be considered under 8 C.F.R. § 1208.16(e) include reasons for the denial and reasonable alternatives such as family reunification in a third country. In an unpublished decision, the Fourth Circuit indicated the agency needs an "especially compelling reason" to deny asylum as a matter of discretion where withholding has been granted, given the disfavored nature of that status and its barriers to family reunification. *Shantu*, 654 F. App'x at 617.

e. Also see additional discretionary factors in *Matter of A-B-*, 27 I&N Dec. 316, 345 n.12 (A.G. 2018)

B. Burden of Proving Past Persecution

1. The applicant bears the burden of proving past persecution. An IJ must make a specific finding as to whether an applicant has established "past persecution." *See Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008).

2. If past persecution is established, applicant then has a presumption of a well-founded fear. 8 C.F.R. § 1208.13(b)(1).

3. The respondent's testimony alone may be enough to satisfy the burden. 8 C.F.R. § 1208.13(a).

4. If the respondent fears harm unrelated to past persecution, then the respondent still has the burden. 8 C.F.R. § 1208.13(b)(1).

5. To rebut the presumption, the DHS bears the burden of proving changed circumstances or safe relocation by a preponderance of the evidence. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

   The respondent must be *able* to relocate (substantially better conditions exist in another area than those that would give rise to the well-founded fear of persecution) AND relocation *must be reasonable* under the circumstances. *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012); 8 C.F.R. § 1208.13(b)(2)(ii)-(b)(3). The regulations provide a non-exhaustive list of factors, including ongoing civil strife; administrative, economical, or judicial infrastructure;

geographical limitations; social/cultural restraints such as age, gender, health; and social/familial ties.

6. If the DHS rebuts the presumption, then "humanitarian" asylum can be granted in the absence of a well-founded fear of future persecution if:

   a. There are compelling reasons arising out of the severity of the past persecution. 8 C.F.R. § 1208.13(b)(1)(iii)(A); *Matter of L-S-*, 25 I&N Dec. 705, 710-12 (BIA 2012); *Matter of Chen*, 20 I&N Dec. 16 (BIA 1989);

   OR

   b. There is a reasonable possibility of "other serious harm" upon return (i.e., the harm need not be related to a protected ground). 8 C.F.R. § 1208.13(b)(1)(iii)(B); *Matter of L-S-*, 25 I&N Dec. 705, 714 (BIA 2012) (suggests factors to consider when looking at "other serious harm"). Other serious harm must be at least as severe as the persecution. Examples: civil strife, extreme economic deprivation, potential for new mental/physical harm to occur.

   For example, compare two cases involving aliens mistreated by the communist secret police in Afghanistan while the Mujahidin were trying to overthrow the government. *Compare Matter of N-M-A-*, 22 I&N Dec. 312 (BIA 1998) (discussing that although the respondent suffered a one-month detention, physical beatings with no long-term injuries, and the disappearance (and likely death) of father, this was insufficient for a grant of asylum), *and Matter of B-*, 21 I&N Dec. 66 (BIA 1995) (determining that the respondent's one-year detention in deplorable/tortuous conditions, and long-term injuries were sufficiently atrocious/severe to warrant a grant of asylum).

C. Proving a Well-Founded Fear

(If no showing of past persecution, applicant bears the burden of demonstrating a well-founded fear of future persecution)

1. Can be based on applicant's testimony alone, if credible. 8 C.F.R. § 1208.13(a).
2. Subjective prong of well-founded fear: Genuine apprehension or awareness of danger. *Matter of Acosta*, 19 I&N Dec. 211, 221 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).
3. Objective prong of well-founded fear: Reasonable person standard—*Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (holding that an applicant for asylum has established a well-founded fear if a reasonable person in his circumstances would fear persecution, which may be the case even where the likelihood of

persecution is significantly less than clearly probable).[4]

4. "Pattern or practice." 8 C.F.R. § 1208.13(b)(2)(iii)(A) (group of persons similarly situated to the applicant are persecuted on account of one of the five protected grounds);

   Matter of A-M-, 23 I&N Dec. 737 (BIA 2005) (noting that the threat of harm to Chinese Christians in Indonesia by the government, or by forces that the government is unable or unwilling to control, is so systemic or pervasive as to amount to a pattern or practice of persecution") (citing *Lie v. Ashcroft*, 396 F.3d 530, 537 (3d Cir. 2005));

   Ye v. Lynch, 845 F.3d 38, 45 (1st Cir. 2017) (noting that the standard for proving a pattern or practice of persecution "requires a showing of regular and widespread persecution creating a reasonable likelihood of persecution of all persons in the group" (citing *Rasiah v. Holder*, 589 F.3d 1, 5 (1st Cir. 2009)).

   Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008) (finding a pattern or practice of persecuting gay men in Jamaica).

5. "Disfavored group" (Ninth Circuit only)—*Wakkary v. Holder*, 558 F.3d 1049 (9th Cir. 2009); *Sael v. Ashcroft*, 386 F.3d 922 (9th Cir. 2004). For more information, *see* Adam L. Fleming, *Organized Atrocities: Asylum Claims Based Upon a "Pattern or Practice" of Persecution*, 7 (no. 3) Imm. L. Advisor 1 (March 2013).

6. Internal relocation: In cases in which the applicant has not suffered past persecution, s/he has burden to prove that s/he cannot avoid persecution by relocating to a different part of the country or that it would be unreasonable to expect him/her to relocate. 8 C.F.R. § 1208.13(b)(2)(ii), (b)(3)(i).

   In cases in which the persecutor is a government or is government-sponsored, it is presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3)(ii).[5]

   The following circuit court examples cite to either 8 C.F.R. § 1208.13(b)(2)(ii), or 8 C.F.R. § 208.13(b)(2). *See, e.g.*, *Khattak v. Holder*, 704 F.3d 197, 203 (1st Cir. 2013); *Ritonga v. Holder*, 633 F.3d 971, 977 (10th Cir. 2011); *Fakhry*

[4] *But see Valle-Zometa v. INS*, 921 F.2d 282 (9th Cir. 1990) (unpublished decision) (finding that the Board's reasonable person test, as articulated in *Matter of Mogharrabi*, contradicted the Supreme Court's decision in *Cardoza-Fonseca*).

[5] *See Singh v. Sessions*, 687 Fed. App'x 36 (2d Cir. 2017) (unpublished) (noting that the IJ's finding that alien could relocate within India to avoid persecution was erroneous because the IJ improperly placed the burden of proof on alien when his alleged persecutor was the Indian government).

v. Mukasey, 524 F.3d 1057, 1065 (9th Cir. 2008); *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008); *Arboleda v. U.S. Att'y Gen.*, 434 F.3d 1220, 1223 (11th Cir. 2006); *Chen v. U.S. Dep't of Justice*, 468 F.3d 109, 111-12 (2d Cir. 2006); *Mohamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005); *Vente v. Gonzales*, 415 F.3d 296, 303 (3d Cir. 2005).

NOTE: While the Board addressed internal relocation in *Matter of C-A-L-*, 21 I&N Dec. 754 (BIA 1997), circuit courts have not cited to this case on the topic since 2006.

In cases in which an applicant has suffered past persecution and the DHS must rebut the presumption of well-founded fear of future persecution and demonstrate that the respondent could avoid future persecution by reasonably relocating to another part of his country of nationality, the Board has set forth criteria that the Attorney General and the DHS must meet. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012). The factors used to assess reasonableness of relocation include, but are not limited to: whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. These factors may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate. 8 C.F.R. § 1208.13(b)(3); *Matter of M-Z-M-R-*, *supra*, at 34-35.

7. Identity of the applicant: *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998) (asylum seeker has "the burden of establishing identity, nationality, and citizenship").

8. Prediction of future events**:** A number of circuits have held that prediction of future events that would support a finding of a well-founded fear of persecution is fact-finding and must be reviewed by the Board for "clear error." *Rosiles-Camarena v. Holder*, 735 F.3d 534 (7th Cir. 2013); *Zhou Hua Zhu v. U.S. Att'y Gen.*, 703 F.3d 1303 (11th Cir. 2013); *Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Turkson v. Holder*, 667 F.3d 523 (4th Cir. 2012); *Hui Lin Huang v. Holder*, 677 F.3d 130 (2d Cir. 2012); *Huang v. Att'y Gen. of U.S.*, 620 F.3d 372 (3d Cir. 2010) (asylum); *Kaplun v. Att'y Gen. of U.S.*, 602 F.3d 260 (3d Cir. 2010) (CAT).

   The Board follows these circuits and applies a clear error standard in all cases. *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015), *overruling Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). **Note**, however, that while *Matter of Z-Z-O-* also overruled *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010) with regard to what standard of review to apply to future predictions, it did not disturb the latter case's conclusions regarding the

significance of DOS reports and our authority to afford different weight to the evidence from that given by the IJ.

D. Withholding of Removal under section 241(b)(3)

1. Mandatory relief – may not be denied as an exercise of discretion.
2. Clear probability standard—*INS v. Stevic*, 467 U.S. 407 (1984) ("The question under that standard is whether it is more likely than not that the alien would be subject to persecution.") = greater than a 50% chance. **NOTE:** 7th Circuit has rejected "more likely than not" standard and applies "substantial risk/probability" standard in both Withholding under the Act and under the CAT. *Velasquez- Banegas v. Lynch*, 846 F.3d 258, 261-62 (7th Cir. 2017).
3. An applicant still benefits from the presumption of future persecution if he establishes past persecution. To rebut the presumption, DHS bears the burden of proving changed circumstances or safe relocation by a preponderance of the evidence. 8 C.F.R. § 1208.16(b)(1)(i)-(ii).
4. An IJ must enter an order of removal where withholding is granted but asylum is denied. *Matter of I-S- and C-S-*, 24 I&N Dec. 432 (BIA 2008).
5. **NOTE**: A number of circuits and the Board have held that predicting future events that would support a finding of persecution to be more likely than not to occur to the applicant is fact-finding and must be reviewed by the Board for "clear error."

E. Withholding and Deferral of Removal under Convention Against Torture (CAT):

If eligible, it is mandatory, but note that deferral can be temporary. *See* 8 C.F.R. §§ 1208.16-1208.18.

1. Applicant has the burden to establish that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2).

   NOTE: 7th Circuit has recently used a new standard – "substantial risk" of torture. *See Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1135-36 (7th Cir. 2015); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 800, 804 (7th Cir. 2016).

2. Torture defined at C.F.R. § 1208.18(a)(1)-(8):
   - Causes severe physical/mental pain
   - Intentionally inflicted
   - For proscribed purpose

- By, at instigation of, or with consent/acquiescence of public official
- Custody/physical control of victim
- Does not arise from lawful sanctions

a. Inadequate prison conditions not tantamount to "torture" unless shown to be intentionally inflicted on applicant. *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002), *overruled on other grounds by Azanor v. Ashcroft*, 364 F.3d 1013, 1020 (9th Cir. 2004) (rejecting the Board's requirement that the victim be in the custody or physical control of a public official).

b. *Kone v. Holder*, 620 F.3d 760 (7th Cir. 2010) - Threat of FGM on alien's USC daughter (against alien's will), if the daughter returned to Mali, could constitute direct persecution of aliens cognizable under the Convention Against Torture.

c. Inadequate medical care—also must be shown to be intentionally inflicted. *Villegas v. Mukasey*, 523 F.3d 984 (9th Cir. 2008) (inadequate psychiatric care at Mexican institution); *Pierre v. Att'y Gen. of U.S.*, 528 F.3d 180 (3d Cir. 2008) (inadequate medical care at Haitian prison).

d. *Johnson v. Att'y Gen. of U.S.*, 380 F. App'x 225 (3d Cir. 2010) (unpublished remand) (court found the Board erred in applying de novo standard of review, as opposed to clearly erroneous standard, when reversing IJ's determination that torture was likely to occur in Jamaican prison to applicant with serious mental health issues).

3. Prediction of future events: As with a WFF determination, a number of circuits and the Board have held that the prediction of future events that would support a finding of torture more likely than not to occur to the applicant is fact-finding and must be reviewed by the Board for "clear error."

4. Specific intent requirement: Torture must be "specifically intended to inflict severe physical or mental pain or suffering." 8 C.F.R. § 1208.18(a)(5).

a. The Board has interpreted the "specific intent" requirement as "intent to accomplish the precise criminal act that one is later charged with," distinguishing it from "general intent," which commonly "takes the form of recklessness . . . or negligence." *Matter of J-E-*, 23 I&N Dec. 291, 300-01 (BIA 2002), *overruled on other grounds by Azanor v. Ashcroft,* 364 F.3d 1013, 1019- 20 (9th Cir. 2004).

b. Circuits that have considered this issue have deferred to the Board's interpretation of the specific intent requirement. *See, e.g., Elien v. Ashcroft,* 364 F.3d 392, 398–99 (1st Cir. 2004); *Pierre v. Gonzales,* 502 F.3d 109, 113-19 (2d Cir. 2007); *Pierre v. Att'y Gen.,* 528 F.3d 180, 189 (3d Cir. 2008) (en banc); *Cherichel v. Holder*, 591 F.3d 1002, 1016-17 (8th Cir. 2010);

Villegas v. Mukasey, 523 F.3d 984, 988 (9th Cir. 2008); *Cadet v. Bulger,* 377 F.3d 1173, 1190, 1193, 1195 (11th Cir. 2004). *See also Majd v. Gonzales*, 446 F.3d 590, 597 (5th Cir. 2006) (affirming the Immigration Judge's finding that most of the applicant's suffering was not inflicted with the specific intent of the government forces).

5. Acquiescence requirement: Torture must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1).

   a. Acquiescence is defined in the regulations as requiring that the public officials must have been aware of the torture and must breach his or her legal responsibility to intervene. *See* 8 C.F.R. § 1208.18(a)(7).

   b. Gov't Actions not Satisfying Breach of Legal Duty

      - Warfare against insurgent groups - *Limani v. Mukasey*, 538 F.3d 25 (1st Cir. 2008).
      - Investigation, arrest, prosecution - *Ali v. Reno*, 237 F.3d 591 (6th Cir. 2001)
      - Large-scale effort to combat criminal entities - *Saldana v. Lynch*, 820 F.3d 970 (8th Cir. 2016).
      - Nat'l gov't reconciliation efforts b/w factions - *Alphonsus v. Holder*, 705 F.3d 1031 (9th Cir. 2013).

   c. Generally, no breach of duty when the applicant provides law enforcement with only limited information regarding the torturer, such that law enforcement does not have enough information to solve the case. *Alvizures-Gomes v. Lynch*, 830 F.3d 49 (1st Cir. 2016).

      - An applicant's failure to report incidents of past torture can undercut his or her claim that the government would acquiesce to any torture. This is especially true when country conditions evidence indicates that the government generally controls the feared torture. *Mayorga-Vidal v. Holder*, 675 F.3d 9 (1st Cir. 2012). However, similar to asylum and withholding, an applicant's failure to report past torture does not undercut a CAT claim if he or she can show that reporting the torture would have been futile. *Afriyie v. Holder*, 613 F.3d 924 (9th Cir. 2010).

   d. Gov't Actions establishing lack of Acquiescence

      - *Granada-Rubio v. Lynch*, 814 F.3d 35, 37-38, 40 (1st Cir. 2016); *Ordonez– Tevalan v. Att'y Gen. of U.S.*, 837 F.3d 331 (3d Cir. 2016); *Lizama v. Holder*, 629 F.3d 440, 449–50 (4th Cir. 2011); *Ramirez-Mejia*

v. Lynch, 794 F.3d 485, 493-94 (5th Cir. 2015); *Alhaj v. Holder*, 576 F.3d 533, 536-39 (6th Cir. 2009); *Bitsin v. Holder*, 719 F.3d 619, 631 (7th Cir. 2013); *Saldana v. Lynch*, 820 F.3d 970, 976-78 (8th Cir. 2016); *Alphonsus v. Holder*, 705 F.3d 1031, 1049 (9th Cir. 2013); *Ferry v. Gonzales*, 457 F.3d 1117, 1131 (10th Cir. 2006); *Rodriguez Morales v. U.S. Att'y Gen.*, 488 F.3d 884, 891 (11th Cir. 2007).

e. Official capacity – Color of Law - *Garcia v. Holder*, 756 F.3d 885 (5th Cir. 2014)

- "an act is under color of law when it constitutes a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Id.* at 891; *Iruegas-Valdez v. Yates*, 846 F.3d 806 (5th Cir. 2017); *see also Ramirez-Peyro v. Holder*, 574 F.3d 893, 895-98, 902-05 (8th Cir. 2009); *Baghdasaryan v. Holder*, 592 F.3d 1018, 1020-21, 1024-26 (9th Cir. 2010) (The court stressed that where "a government official uses the resources of his office to extort bribes from many people, he is engaged in more than aberrational conduct.").

f. Rogue Official

- *Costa v. Holder*, 733 F.3d 13, 14–15, 17–18 (1st Cir. 2013) - The court denied protection under CAT, noting that although there was a high level of police abuse and impunity in Brazil, there were also investigations and prosecutions of corrupt police officers and the government had cracked down on corruption. The court concluded that the evidence did not provide a sufficient basis to overturn the Board's determination that "the actions of two rogue police officers do[] not constitute government action." *Id.* at 18. And the inference that a larger group of officers were willing to help the officers who threatened the alien was not inevitable. *Id.*
- *Romilus v. Ashcroft*, 385 F.3d 1, 3-4, 9 (1st Cir. 2004).
- *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004), *amended*.
- *Suarez-Valenzuela v. Holder*, 714 F.3d 241 (4th Cir. 2013).
- *Miah v. Mukasey*, 519 F.3d 784, 786-88 (8th Cir. 2008).

The 7th and 9th Circuits generally do not agree with the Board's characterization of officials as "rogue":

- *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1183-85 (7th Cir. 2015) - it is irrelevant whether the police are "rogue" in that they are not serving the interests of the Mexican government. An alien need not prove that the Mexican government is complicit in the misconduct of its officers. It

is not enough to bar removal that the government is trying, but without much success, to prevent police torturing citizens at the behest of drug gangs.

- *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1076, 1079-80 (9th Cir. 2015) (rejected gov't's argument that uniformed, on-duty police officers and military officers who assaulted and raped alien were "rogue" officials b/c alien did not show acquiescence by a higher level member of the Mexican government).
- *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) (an applicant can establish CAT eligibility based on actions taken by off-duty police officials (rogue officials even if not acting in their official capacity)).

g. Relevance of a Gov't's ability to control torturers

- *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007) ("[A]lthough a government's ability to control a particular group may be relevant to an inquiry into governmental acquiescence under the CAT, that inquiry does not turn on a government's 'ability to control' persons or groups engaging in torturous activity."); *see also, e.g., Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014); *Tamara-Gomez v. Gonzales*, 447 F.3d 343, 351 (5th Cir. 2006); *Sarhan v. Holder*, 658 F.3d 649, 657-58 (7th Cir. 2011); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 n.3 (8th Cir. 2009); *Reyes-Sanchez v. U.S. Att'y Gen.*, 369 F.3d 1239, 1242-43 (11th Cir. 2004); *Ramirez-Peyro v. Holder*, 574 F.3d 893 (8th Cir. 2009).
- Generally, evidence of a government's inability to control torturers is not relevant if the evidence establishes that the government is willing to control the torture. However, the 3rd, 7th, and 9th Circuits generally hold that evidence of a government's inability to control torture is always relevant. *See, e.g.*, *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1140 (7th Cir. 2015) (holding that success—or lack thereof—of government efforts to control torture—is relevant to the likelihood of torture); *Sarhan v. Holder,* 658 F.3d 649, 657-58 (7th Cir. 2011); *Silva-Rengifo v. Att'y Gen. of U.S.*, 473 F.3d 58, 65 (3d Cir. 2007); *Zheng v. Ashcroft*, 332 F.3d 1186, 1195 n.8 (9th Cir. 2003).

h. "Public Official"

- Neither the CAT regulations, 8 C.F.R. § 208.18, nor the Convention Against Torture, Art I (which § 208.18 incorporates), defines the term "public official." *Kamara v. Att'y Gen. of U.S.*, 420 F.3d 202, 215-16 (3d Cir. 2005) (remanding to the Board to address whether the Revolutionary United Front (RUF) constitutes a "public official" for

purposes of 8 C.F.R. § 208.18).

- A public official has been described as an individual with political or government affiliations. *See Kasneci v. Gonzales*, 415 F.3d 202, 205 (1st Cir. 2005) (holding that the IJ found no link between the attacks against the respondent at his family-owned gas station in Albania and "the attackers' alleged political or government affiliations").
  - Compare with *Ang v. Gonzales*, 430 F.3d 50, 59 (1st Cir. 2005), finding that a disgruntled ex-employee on security detail for the U.S. Embassy in Cambodia was not considered a public official, and
  - *Tendean v. Gonzales*, 503 F.3d 8 (1st Cir. 2007) - Person who ran for (but didn't obtain) public office.

  Examples of public officials include prison guards and police officers:

  - Prison Guards: *Roye v. Att'y Gen. of U.S.*, 693 F.3d 333 (3d Cir. 2012) (vacating the Board's decision and remanding the case where the respondent would likely be imprisoned in Jamaica due to his mental illness and would likely suffer physical and mental abuse at the hands of prison guards and inmates because of his mental illness).
  - Police Officers: *Zelaya v. Holder*, 668 F.3d 159, 168 (4th Cir. 2012) (discussing that police officers' refusal to help Respondent who was threatened with a gunshot by the MS-13 gang is a breach of the local police's legal responsibility to intervene to prevent severe pain or suffering from being inflicted on the respondent).
- An individual need only show that a state or local official acquiesces, even if the federal government of the country would not acquiesce. *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015); *see also Madrigal v. Holder*, 716 F.3d 499, 509-10 (9th Cir. 2013).
- With regard to acquiescence, evidence that government has been generally ineffective in preventing or investigating criminal activities is not enough to constitute acquiescence. *See Garcia-Milian v. Holder*, 755 F.3d 1026, 1033-35 (9th Cir. 2014).
- *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 820 (11th Cir. 2004) (holding that the alien did not demonstrate that the harm he suffered was inflicted at the instigation of, or with the consent or acquiescence of, a public official in Somalia because the objective evidence indicated "that Somalia currently has no central government, and the clans who control various sections of the country do so through continued

warfare and not through official power").

- *Pavlyk v. Gonzales*, 469 F.3d 1082, 1090 (7th Cir. 2006) (finding that alien had not shown the requisite level of acquiescence where he had been threatened by a private individual, who was not a public official or acting in an official capacity, and could not identify the individuals who shot at him, although he speculated that the police "organized" the shooting). *See also Ishitiaq v. Holder*, 578 F.3d 712, 718 n.3 (7th Cir. 2009) (holding that an alien who had been shot at by Islamist militants had not alleged that the Pakistani government would torture him or acquiesce to his torture as needed for protection under the CAT).

i. Awareness

- *Matter of S-V-*, 22 I&N Dec. 1306, 1312 (BIA 2000) ("To demonstrate 'acquiescence' by [foreign] Government officials, the respondent must do more than show that the officials are aware of the activity constituting torture but are powerless to stop it. He must demonstrate that [the foreign] officials are *willfully accepting* of the . . . tortuous activities.") (emphasis added); *see also Regalado-Escobar v. Holder*, 717 F.3d 724, 731 (9th Cir. 2013) (holding that the alien had "not shown that public officials were aware of the attacks by the National Liberation Front for Farabundo Marti").

  Most circuits now apply the "willful blindness" standard (discussed below); *see also Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270, 283 (A.G. 2002) (finding that the relevant inquiry under the CAT is "whether governmental authorities would approve or 'willfully accept' atrocities committed against persons in the respondent's position").

- "Willful blindness" standard:

  - The Ninth Circuit first articulated this standard in *Zheng v. Ashcroft*, 332 F.3d 1186, 1188–89 (9th Cir. 2003) ("We conclude that the BIA's interpretation of acquiescence to require that government officials 'are willfully accepting' of torture to their citizens by a third party is contrary to clearly expressed congressional intent to require only 'awareness,' and not to require 'actual knowledge' or 'willful accept[ance]' in the definition of acquiescence."); *see also Cole v. Holder*, 659 F.3d 762, 771 (9th Cir. 2011) ("Acquiescence by government officials 'requires only that [they] were aware of the torture but "remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it."'" (quoting *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008)). The Second Circuit adopted this reasoning in *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004).

- The Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have all since endorsed the "willful blindness" test. *See Hakim v. Holder*, 628 F.3d 151 (5th Cir. 2010); *Silva-Rengifo v. Att'y Gen. of U.S.,* 473 F.3d 58, 65 (3d Cir. 2007) ("[A]n alien can satisfy the burden established for CAT relief by producing sufficient evidence that the government in question is willfully blind to such activities."); *Khrystotodorov v. Mukasey*, 551 F.3d 775, 782 (8th Cir. 2008) ("A government's 'willful blindness toward the torture of citizens by third parties' amounts to unlawful acquiescence"); *see also Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 n.3 (8th Cir. 2009) (same); *Mouawad v. Gonzales*, 485 F.3d 405 (8th Cir. 2007) (finding that a "government cross[es] the line into acquiescence when it shows willful blindness toward the torture of citizens by third parties"); *Tunis v. Gonzales*, 447 F.3d 547, 551 (7th Cir. 2006); *N.L.A. v. Holder*, 744 F.3d 425, 442 (7th Cir. 2014) (citing the willful blindness standard favorably); *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006) (holding that "*[Matter of] S-V-* was manifestly contrary to the law," and thus "'willful blindness' falls within the definition of 'acquiescence.'"); *Karki v. Holder*, 715 F.3d 792, 806-07 (10th Cir. 2013); *Cruz-Funez v. Gonzalez*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Zheng* and finding that "Congress made its intent clear that actual knowledge, or willful acceptance, is not required for a government to 'acquiesce' to the torture of its citizens"); *Lopez-Soto v. Ashcroft,* 383 F.3d 228, 240 (4th Cir. 2004) ("awareness includes both actual knowledge and willful blindness.") (citing *Zheng,* 332 F.3d at 1194) (quotations omitted); *Suarez-Valenzuela v. Holder*, 714 F.3d 241, 245-46 (4th Cir. 2013).
- Two Circuits, the First and the Eleventh, have not adopted the "willful blindness" test. The First Circuit has not attempted to define government acquiescence and has so far upheld the Board's determinations on this issue. *See Granada-Rubio v. Lynch*, 814 F.3d 35, 39 (1st Cir. 2016) (appearing to treat acquiescence and "willful blindness" as distinct issues, stating that the alien had "not shown that she will be subject to torture through the acquiescence or willful blindness of a public official"); *Faye v. Holder*, 580 F.3d 37, 42 (1st Cir. 2009). In *Reyes-Sanchez v. U.S. Atty. Gen.*, 369 F.3d 1239, 1142 (11th Cir. 2004), the Eleventh Circuit discussed the petitioner's view that it should adopt the Ninth Circuit's willful blindness interpretation, but reasoned that, because the police had investigated the assaults and the government opposed the terrorist group in question, the acquiescence element had not been satisfied.

- However, recent 1st and 11th Circuit cases have tacitly acknowledged the willful blindness standard. *Gurung v. Lynch*, 618 F. App'x 690 (1st Cir.

2015); *Mendoza-Rodriguez v. U.S. Att'y Gen.*, 405 F. App'x 359 (11th Cir. 2010)

6. An applicant cannot establish a likelihood of torture by stringing together a series of suppositions. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (holding that one must show that each link in the causal chain is more likely than not to occur); *see also Matter of Y-L-, A-G- & R-S-R-*, 23 I&N Dec. 270, 282 (A.G. 2002).

F. CAT Deferral of Removal—8 C.F.R. § 1208.17

Available to applicant who demonstrates likelihood of torture, but is subject to the bars in section 241(b)(3)(B) of the Act that render applicant ineligible for CAT Withholding. *See* 8 C.F.R. § 1208.16(d)(2).

CAT deferral differs from CAT Withholding in that:

1. Continued detention possible following grant of deferral application – 8 C.F.R. §1208.17(c).
2. IJ must give notice to alien of conditions of the deferral grant – 8 C.F.R. § 1208.17(b).
3. DHS may seek termination of a deferral grant at any time by filing a motion with accompanying relevant evidence that was not present at the previous hearing – 8 C.F.R. § 1208.17(d)(1).

V. Highlights of Case Law Relating to Asylum and 241(b)(3) Withholding

A. What is "persecution"?

1. *Matter of Acosta*, 19 I&N Dec. 211, 223 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), defines persecution as: "harm or suffering . . . inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome."
2. *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007): non-physical harm may count – that is, deliberate imposition of *severe* economic disadvantage or deprivation of liberty, food, housing, employment, etc.
3. Non-physical harm: *psychological harm* may count. *See Tadesse v. Gonzales*, 492 F.3d 905, 912 (7th Cir. 2007) (considering the "lasting psychological damage" of the gang rape that the Eritrean applicant suffered and the fact that she lost all her family in the war as part of persecution analysis and remanding to the Board); *see also Niang v. Gonzales*, 492 F.3d 505, 512 (4th Cir. 2007) (distinguishing psychological harm resulting from female genital mutilation that could rise to the level of persecution from "a fear of psychological harm alone" that would not rise to the level of persecution; denying Senegalese applicant's withholding of removal based on psychological harm she would suffer if her 5-year-old daughter was forced to undergo FGM).

4. *He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014) – economic persecution requires "substantial economic deprivation that interferes with the applicant's livelihood."

   NOTE: Board chose not to follow the Ninth Circuit's lower standard of "deliberate imposition of *substantial* economic disadvantage." *See Kovac v. INS*, 407 F.2d 102, 107 (9th Cir 1969); *see also He*, 749 F.3d at 796. However, we still apply "substantial economic deprivation" standard in the Ninth Circuit.

5. Incidents, in the aggregate, can rise to the level of persecution as contemplated by the Act. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998); *see also Matter of L-K-*, 23 I&N Dec. 677, 683 (BIA 2004) (finding that the harm the respondent suffered during a "series of home invasions" rose to the level of persecution).

6. *Threats alone* are generally not enough to constitute persecution. *See Lim v. INS*, 224 F.3d 929 (9th Cir. 2000); *Boykov v. INS*, 109 F.3d 413, 416 (7th Cir. 1997).

   a. But, in a small number of cases, threats were found to be past persecution, where threats were of an immediate and menacing nature to cause significant suffering or harm, were imminent or concrete, or were accompanied by some additional evidence of harm to applicant or where other family members were beaten/murdered. *See Javed v. Holder*, 715 F.3d 391, 396 (1st Cir. 2013) (concluding that death threats to Pakistani lawyer based on imputed political opinion rose to the level of past persecution and remanding to the Board); *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (finding that three death threats by gang was sufficient for Salvadoran asylum applicant to establish well-founded fear of future persecution and remanding to the Board); *Pathmakanthan v. Holder*, 612 F.3d 618, 623 (7th Cir. 2010) (finding that "[t]hreats alone, and particularly threats of death, can amount to persecution under certain circumstances."); *Zhu v. Gonzales*, 493 F.3d 588, 598 (5th Cir. 2007) (finding that the "threat of a physically compelled abortion or forcible sterilization rises to the level of persecution," and remanding Chinese applicant's withholding of removal claim to the Board); *Delgado v. U.S. Att'y Gen.*, 487 F.3d 855, 861 (11th Cir. 2007); *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000). *Contra Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats as harassment rather than persecution).

   b. Threats may be indicative of a danger of future persecution. *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000).

7. *Harm to family members* may constitute past persecution of respondent. *See Flores v. Holder*, 699 F.3d 998, 1003 (8th Cir. 2012) (finding that an applicant may demonstrate persecution by showing past persecution to family members on account of a protected ground and remanding to the Board for reconsideration of adopting IJ's rule that past persecution of family members can "never" be a basis

for a past persecution claim); *Chen v. Holder*, 604 F.3d 324, 333 (7th Cir. 2010) (finding that the Board should consider the totality of the circumstances "to determine whether harm suffered by family members in combination with other factors may constitute past persecution of the applicant, even if government authorities neither directly harmed the applicant nor harmed the family member in order to target the applicant."); *Camara v. Att'y Gen. of U.S.*, 580 F.3d 196, 205 (2d Cir. 2009), *as amended* (Nov. 4, 2009) (finding that "a person who has directly witnessed a brutal assault on a family member has experienced so devastating a blow as to rise to the level of persecution.")

8. Age considerations: the First, Second, Seventh, and Ninth Circuits have explicitly held that "age can be a critical factor" in determining whether the harm a child suffers or fears may constitute persecution. *Santos-Guaman v. Sessions*, 891 F.3d 12 (1st Cir. 2018); *Ordonez-Quino v. Holder*, 760 F.3d 80, 91 (1st Cir. 2014); *Jorge–Tzoc v. Gonzales,* 435 F.3d 146 (2d Cir. 2006); *Liu v. Ashcroft*, 380 F.3d 307, 314 (7th Cir. 2004); *Hernandez–Ortiz v. Gonzales,* 496 F.3d 1042, 1045 (9th Cir. 2007). Most of the other circuits have recognized either indirectly or in unpublished decisions that an applicant's age may affect whether harm rises to the level of persecution.

   a. Third and Tenth Circuits: Age is an appropriate consideration. Unpublished decisions from both courts have indicated that age is an appropriate factor to consider in past persecution determinations. *See Razzak v. Att'y Gen. of U.S.*, 287 F. App'x 208, 212–13 (3d Cir. 2008); *Pacaja Vicente v. Holder*, 451 F. App'x 738, 743 n.6 (10th Cir. 2011).

   b. Fourth Circuit: Asylum standard is no different for adult and child applicants, but age consideration is part of the standard. *See Cruz-Diaz v. INS*, 86 F.3d 330, 331 (4th Cir. 1996) (noting the subjective and objective aspects of well- founded fear "necessarily include consideration of age," and citing *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), which states "the reference to 'fear' in the § 208(a) standard obviously makes the eligibility determination turn to some extent on the subjective mental state of the alien"); *Garcia-Garcia v. INS*, 173 F.3d 850, 1999 WL 150822 (4th Cir. 1999) (unpublished).

   c. Fifth Circuit: Age is not always relevant as to whether a particular act constitutes persecution. *Paz-Caballero v. INS*, 47 F.3d 427, 1995 WL 71383 (5th Cir. 1995) (unpublished) (rejecting a petitioner's assertion that being under the legal draft age transformed his conscription into "persecution").

   d. Sixth Circuit: Age may affect testimony. *See Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (noting that a child may be incapable of articulating his or her fear or testifying in detail about personal matters).

e. Eighth Circuit: Age progression may rebut presumption of a well-founded fear. The Eighth Circuit has held that where a child experienced past persecution, the child's subsequent progression to adulthood may constitute a "fundamental change in circumstances" that rebuts the presumption of a well-founded fear of future harm. *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 653 (8th Cir. 2007); *see also Ming Li Hui v. Holder*, 769 F.3d 984, 985 (8th Cir. 2014).

B. What is not "persecution?"

1. Discrimination—*Fisher v. INS*, 79 F.3d 955, 961–62 (9th Cir. 1996).
2. General violence—*Martinez-Romero v. INS*, 692 F.2d 595 (9th Cir. 1982).
3. Military recruitment—*Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988).

   But see, e.g., *Milat v. Holder*, 755 F.3d 354, 361 (5th Cir. 2014) (stating that prosecution for avoiding military conscription may constitute persecution if the penalty imposed would be disproportionately severe on account of a protected ground or the applicant would be required to engage in inhumane conduct as part of the military service).
4. In some cases, substantial economic deprivation—*He v. Holder*, 749 F.3d 792, 796 (9th Cir. 2014) (finding that the respondent did not demonstrate that the "economic deprivation interfered with his livelihood" because he did not provide any evidence of the effect that a government fine had on him).

C. Particular Social Group

***Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018):**

1. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) is overruled. That decision was wrongly decided and should not have been issued as a precedential decision.
2. An applicant seeking to establish persecution on account of membership in a "particular social group" must demonstrate: (1) membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; and (2) that membership in the group is a central reason for her persecution. When the alleged persecutor is someone unaffiliated with the government, the applicant must also show that her home government is unwilling or unable to protect her.
3. An asylum applicant has the burden of showing her eligibility for asylum. The applicant must present facts that establish each element of the standard, and the asylum officer, immigration judge, or the Board has the duty to determine whether those facts satisfy all of those elements.
4. If an asylum application is fatally flawed in one respect, an immigration judge or the Board need not examine the remaining elements of the asylum claim.

5. The mere fact that a country may have problems effectively policing certain crimes or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.

6. To be cognizable, a particular social group must exist independently of the harm asserted in an application for asylum.

7. An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.

8. An applicant-seeking asylum based on membership in a particular social group must clearly indicate on the record the exact delineation of any proposed particular social group.

9. The Board, immigration judges, and all asylum officers must consider, consistent with the regulations, whether internal relocation in the alien's home country presents a reasonable alternative before granting asylum.

General Concepts

1. To be cognizable, a social group must have (1) immutability, (2) particularity, (3) social distinction, and (4) not be circular.

2. "Immutability": shared experience must be beyond power of group to change or so fundamental to identity/conscience that it ought not be required to be changed— *Matter of Acosta*, 19 I&N Dec. 211, 233–34 (BIA 1985).

3. "Particularity": group's boundaries must be ascertainable; group's membership cannot be too vague, uncertain, or subjective—*Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).

   In *Valdiviezo-Galdamez v. Att'y Gen. of U.S.,* 663 F.3d 582, 608 (3d Cir. 2011), the Third Circuit found that the Board's requirement that a particular social group must possess the elements of "particularity" and "social visibility" was inconsistent with the Board's prior decisions. The Third Circuit thus remanded the matter—the Board then provided clarification of these requirements in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

4. "Social Distinction": same as "social visibility," but a new name; group must be regarded as socially distinct segment of society; literal "visibility" of group is **NOT** determinative—*Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

5. Perceptions of the group are measured from the perspective of society, not the persecutor—*Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

6. Circuit courts have taken various approaches when considering whether particularity or social visibility/distinction applies to asylum claims. Prior to *Matter of W-G-R-* and *Matter of M-E-V-G-*, the majority of circuit courts accepted the social visibility and particularity elements. *See Matter of W-G-R-*, 26 I&N Dec. at 210-11. However, the Third Circuit has declined to afford *Chevron* deference to the Board's interpretation that a PSG be "particular" and "socially visible." *See Valdiviezo-Galdamez*, 663 F.3d at 608. The Seventh Circuit has rejected social visibility. *See Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). In addition, the Seventh Circuit has issued precedent contradicting the particularity requirement. *See, e.g., Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013) (rejecting broadness as a per se bar to protected status). After the Board issued *W-G-R-* and *M-E-V-G-*, several circuits have issued precedents discussing or favorably citing the clarified criteria in those Board decisions. *See, e.g., Paiz-Morales v. Lynch*, 795 F.3d 238 (1st Cir. 2015). However, the Seventh Circuit has issued precedent decisions continuing to treat immutability as the sole requirement without specifically discussing *W-G-R-* and *M-E-V-G-*. The Third Circuit has not issued a precedent decision on this issue since those Board decisions. The Ninth Circuit has clarified the criteria while reserving assessment of their validity. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1082 – 85 (9th Cir. 2014) (declining to decide whether Board's requirements of social distinction and particularity constitute a reasonable interpretation of PSG).

Examples of cognizable PSGs:

Matter of Toboso-Alfonso, 20 I&N Dec. 819 (BIA 1990) (homosexuals = PSG).

Matter of H-, 21 I&N Dec. 337 (BIA 1996) (sub-clan in Somalia = PSG).

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996) (young women not yet subjected to FGM as practiced by their tribe who oppose FGM = PSG).

Matter of V-T-S-, 21 I&N Dec. 792, 798 (BIA 1997) (Filipinos of mixed Filipino-Chinese ancestry = PSG).

Avendano-Hernandez v. Lynch, 800 F.3d 1072, 1082 (9th Cir. 2015) - The unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant's asylum, withholding of removal, or CAT claim.

Examples of Groups deemed not to be PSGs:

NOTE: These groups may still constitute valid PSGs; must engage in case-by-case analysis of evidence to determine whether the group is recognized by the particular society in question. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) ("The BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity.").

Matter of Vigil, 19 I&N Dec. 572, 575 (BIA 1988) ("young, male, unenlisted, urban Salvadorans" not a PSG—these are not factors "fundamental to individual identity or conscience").

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006) (non-criminal confidential drug informants not a PSG—not socially distinct and too loosely defined to meet "particularity" requirement).

Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007), *aff'd, Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007) ("affluent Guatemalans" not socially distinct or particular—too vague and subjective).

Vega-Ayala v. Lynch, 833 F.3d 34 (1st Cir. 2016) ("Salvadoran women in intimate relationships with partners who view them as property" – not immutable and not socially distinct. Court noted that the respondent's articulated PSG was not immutable because the evidence established that the respondent could have left the relationship)

Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016) ("former members of the Mara 18 gang in El Salvador who have renounced their gang membership" and "deportees from the United States to El Salvador" – not socially distinct and do not meet particularity requirement)

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018)(overruling *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which held that, depending on the facts and evidence in an individual case, "married women in Guatemala who are unable to leave their relationship" can constitute a PSG).

Melnik v. Sessions, 891 F.3d 278 (7th Cir. 2018) ("business owners in the Ukraine who have been extorted by criminal elements and not protected by the government" – not legally cognizable)

Note: The Fifth Circuit has cautioned that the Board and Immigration Judges should not recharacterize a respondent's claimed particular social group. *See Cabrera v. Sessions*, 890 F.3d 153 (5th Cir. 2018).

Gang-Based Asylum Claims Cases:

Board Precedent:

- *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) (Honduras); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (El Salvador) (fear of gangs/resistance to gang recruitment based on personal, moral, or religious values and activities is not particular or socially visible). (Note: socially visibility is now referred to as social distinction.)
- *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) ("former gang members who renounce their membership"—lacks particularity and social distinction; deportees also too broad to constitute PSG), *vacated in part*

and remanded on other grounds by Reyes v. Lynch, 842 F.3d 1125 (9th Cir. 2016); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) (remanding a case for consideration of whether "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs" is a socially distinct group in Honduran society, emphasizing that claims need to be considered on a case-by-case basis).

Circuit Precedent:

Gang Recruitment

- General opposition to gang membership may lack particularity required to be a PSG. *See, e.g.*, *Paiz-Morales v. Lynch*, 795 F.3d 238, 244 (1st Cir. 2015); *Garcia v. Holder*, 746 F.3d 869 (8th Cir. 2014) (rejecting proposed PSG "young Guatemalan men who have opposed the MS-13, have been beaten and extorted by that gang, reported those gangs to the police, and faced increased persecution as a result" due to lack of both particularity and visibility).
- But where threats were made on the basis of a family connection to an individual who refused to join the gang, the Fourth Circuit found a nexus to a protected ground and remanded the case for further proceedings. *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 947-54 (4th Cir. 2015).
- The Ninth Circuit has determined that the proposed PSG "people opposed to gangs" is immutable. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (remanding for the Board to adequately address social distinction of proposed particular social group).
- General refusal to be recruited, even when accompanied by threats based on the refusal, may lack particularity and social distinction required to be a PSG. *See, e.g.*, *Juarez Chilel v. Holder*, 779 F.3d 850 (8th Cir. 2015).

Gang Membership

Current Gang Member

- *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2009) (determining that gang membership, whether a present or a past shared experience, generally will not define a particular social group because violent criminal activity is not the type of conduct Congress had in mind when crafting the PSG basis for relief). In *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008), *rejected on other grounds*, *Escamilla v. Holder*, 459 F. App'x 776, 786 (10th Cir. 2012), the Board agreed with the Ninth

Circuit that membership in a gang could not constitute membership in a PSG.

Former Gang Member

The Board and the circuit courts have reached varying results when analyzing whether former gang membership may be a protected characteristic of asylum. Certain courts prior to the issuance of *Matter of W-G-R-* and *Matter of M-E-V-G-* have focused on the immutability element in upholding former gang membership as a cognizable PSG, while some courts, post-*W-G-R-* and *M-E-V-G-*, have accorded *Chevron* deference to the Board's construction of the particularity and social distinction requirements in rejecting former gang membership as a PSG.

- The Board has agreed that, as a general rule in the Ninth Circuit, present or past experience in criminal activity cannot be the defining characteristic of a PSG. *See Matter of W-G-R-*, 26 I&N Dec. 208, 215 n.5 (BIA 2014). The Board, however, did not conclude that all former gang members could not qualify as a PSG for asylum.

- The Seventh Circuit has held that, while current gang members are not members of a PSG for purposes of withholding of removal, *former* gang members may be since they share an immutable characteristic of past membership in the gang. *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009). The Seventh Circuit noted that there was no per se bar to asylum or withholding of removal for former gang members.

- Although the Fourth and Sixth Circuits have agreed with the Seventh Circuit on whether former gang membership is an immutable characteristic, the First Circuit has disagreed with that determination. *Compare Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014) (determining that alien's membership in group consisting of former members of gang in El Salvador was an immutable characteristic) *and Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) *with Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013) (declining to follow the Sixth and Seventh Circuits in reversing the Board's interpretation based on policy grounds and noting that sharing an immutable characteristic is a necessary but not sufficient condition to qualify as a PSG). These aforementioned cases were all decided prior to the Board's issuance of *W-G-R-* and *M-E-V-G-*. Neither the Fourth nor the Seventh Circuit applied *Chevron* deference and both circuits' decisions were based largely on immutability or policy reasons.

- Other circuit courts have accorded *Chevron* deference to what they consider to be the Board's determination that former gang members

do not constitute a PSG. *See Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399 (11th Cir. 2016) (noting that Board's determination that "former Mara-18 gang members" is not sufficiently particular based on *Matter of W-G-R-* and the holding that former gang membership was not a cognizable PSG based on *Matter of E-A-G-* was not unreasonable); *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016) (noting that the Board's construction of "particularity" and "social distinction" for social group in which alien seeking relief claimed membership was entitled to *Chevron* deference).

- Since the Board's issuance of *W-G-R-,* the Sixth Circuit has held that the PSG "active and long-term former gang members" in El Salvador lacked social distinction, based on evidence in the record. *Zaldana Menjivar v. Lynch*, 812 F.3d 491, 498-500 (6th Cir. 2015). The Sixth Circuit did not discuss the other PSG prongs.
- In addition, the Fourth Circuit considered the issue of former gang membership in *Oliva v. Lynch*, 807 F.3d 53 (4th Cir. 2015) (remanding the case to the Board for consideration of "unaddressed evidence" relating to whether Salvadoran society perceived individuals who left the MS-13 gang without its permission as a cognizable PSG, including evidence of government and community programs to help former gang members rehabilitate themselves and an affidavit from a community organizer stating that former gang members who leave the gang for religious reasons become seriously and visibly involved in churches). The Fourth Circuit did not discuss the particularity and immutability prongs.

Perceived as a Gang Member, but Not a Member

- The Seventh Circuit found error in an IJ's determination that an alien would need to take additional, visible steps (perhaps tattoo removal) to distance himself from a gang. *Arrazabal v. Lynch*, 822 F.3d 961 (7th Cir. 2016).

Victim of Gang Violence based on Family Membership

- *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015) (finding the Board erred in not addressing a withholding of removal claim that the applicant risks persecution by a gang because of its vendetta against his family, but upheld the denial of applicant's religion claim).

  The Ninth Circuit joined the First, Fourth, and Sixth, Circuits in recognizing that the "family" may constitute a PSG. *See Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Crespin- Vallardares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011); *Al-Ghorbani v. Holder*, 585 F.3d

980, 995 (6th Cir. 2009). The Second, Seventh, and Eighth Circuits have also recognized that a nuclear family can constitute a PSG. *See Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014) (citing *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007)); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005).[6]

- Mixed Motive, Claims in the Fourth Circuit: *Cordova v. Holder*, 759 F.3d 332, 334-39 (4th Cir. 2014) (finding that the Board had not properly considered the alien's evidence that threats he received were motivated by retaliation for his cousin and uncle's membership in a rival gang, and concluding that the recruitment motivation underlying the alien's persecution did not preclude the existence of another central reason—family ties—for that persecution); *Cruz v. Sessions*, 853 F.3d 122 (4th Cir. 2017) (applying *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) and determining that alien's PSG of nuclear family ties to husband who she suspected was murdered by his employer with organized crime ties was one central reason for persecution); *Olivia v. Lynch*, 807 F.3d 53, 60 (4th Cir. 2015) (although a former gang member's failure to pay rent was the immediate trigger for the harm he suffered, "it was [his] status as a former gang member that led MS-13 to demand rent in the first place and to assault him for failure to pay it."); *Zavaleta-Policiano v. Sessions*, 873 F3d. 241 (4th Cir. 2017) (finding that the respondent's familial relationship to her father was at least one central reason gang in El Salvador threatened and extorted her).
- Other Mixed Motive Claims: *Cambara-Cambara v.* Lynch, 837 F.3d 822, 825-26 (8th Cir. 2016) (noting that the applicants "provided no proof that the criminal gangs targeted members of the family because of family relationships, as opposed to the fact that, as prosperous businessmen, they were obvious targets for extortionate demands"); *Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015) (concluding that "the evidence that gang members sought information from [the applicant] about her brother, without more, does not support her claim that the gang intended to persecute her on account of her family").
    - In *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), the Board determined

[6] In February 2016, the Eighth Circuit rejected the following groups: (1) "male, gang-aged family members of murdered gang members" and (2) "male, gang-aged family members of [the alien's] cousin." *See Aguinada-Lopez v. Lynch*, 814 F.3d 924, 926-27 (8th Cir. 2016), *vacated and superseded by Aguinada-Lopez v. Lynch*, 825 F.3d 407 (8th Cir. 2016). However, the Eighth Circuit subsequently vacated its prior opinion and substituted its opinion in *Aguinada-Lopez v. Lynch*, 825 F.3d 407 (8th Cir. 2016). Citing *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005), the Eighth Circuit assumed that the respondent's proposed social groups were cognizable and affirmed the Board's determination for failure to establish nexus. *Id.* at 409

that (1) whether a particular social group based on family membership is cognizable depends on the nature and degree of the relationships involved and how those relationships are regarded by the society in question; and 2) to establish eligibility for asylum on the basis of membership in a particular social group composed of family members, an applicant must not only demonstrate that he or she is a member of the family but also that the family relationship is at least one central reason for the claimed harm. The Board concluded that the respondent did not establish that his membership in a PSG comprised of his father's family members was at least one central reason for the events he experienced at the hands of a criminal cartel/gang and the harm he claims to fear in the future. *See id.*; *compare W.G.A. v. Sessions,* 2018 WL 3979276 (7th Cir August 21, 2018) (where the court found that the R had established that membership in his nuclear family was a cognizable PSG, and that based on his credible testimony and the doc evidence, he established he was persecuted and had a WFF of persecution on account of that protected ground where he showed that gang members "target family units to enforce their orders and to discourage defection." *Id.* at *6).

- Generally, imputed wealthy Americans targeted for gang violence do not constitute a PSG. *See, e.g.*, *Ramirez-Munoz v. Lynch*, 816 F.3d 1226, 1228-29 (9th Cir. 2016); *Rivera v. Lynch*, 845 F.3d 864 (7th Cir. 2017) (determining that alien's fear of being kidnapped for ransom by Salvadoran gangs on account of perceived wealth due to his having resided in U.S. did not constitute a PSG); *Gonzalez-Soto v. Lynch*, 841 F.3d 682 (5th Cir. 2016) (reiterating that returning citizens who are perceived as wealthy are not part of a protected group and that economic extortion is not a form of persecution).

- Criminal Proceedings (Witness, Testifying Witness, Informant against Gangs)

  The Ninth Circuit has recognized witnesses as a cognizable PSG, based on the evidence in each particular record, and especially where there is a tie to family. *See, e.g.*, *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015) (PSG: members of a family against which the gang has a vendetta, where the alien witnessed crimes against the family by the gang); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1083 (9th Cir. 2013) (en banc) (PSG: witnesses who testify against gang members).

  - *See also Garcia v. Att'y Gen. of U.S.*, 665 F.3d 496, 504 (3d Cir. 2011), *as amended* (3d Cir. 2012) (finding cognizable the PSG of individuals who testify against gang members); *Crespin- Vallardares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011) (finding cognizable the PSG of family members of those who actively oppose gangs in El Salvador by agreeing

to be prosecutorial witnesses).

But see re: political opinion*: Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 88–92 (1st Cir. 2008) (concluding that the mere act of giving a statement to the police or testifying before a grand jury is not an expression of political opinion).

- Rarely have courts found that informants against gangs = PSG.
- Tattoos - *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) (finding that *tattooed youths* was not sufficiently particular to constitute a PSG).

VI. Bars and Exceptions to Asylum and Withholding

A. Bars to Asylum

1. One-year time limit —INA § 208(a)(2)(B) – Applicant must show by clear and convincing evidence that he applied for asylum within a year of his "last arrival" (which may be contested),[7] 8 C.F.R. § 1208.4(a)(2)(ii), or establish an exception:

   a. Changed circumstances—in home country or based on activities in the U.S.

   Note: It is important to distinguish between changed circumstances (including changed personal circumstances) that may be sufficient to overcome the one-year bar and changed country conditions sufficient to support a motion to reopen to apply or reapply for asylum and withholding of removal. *Compare* 8 C.F.R. § 1208.4(a)(4) *with* 8 C.F.R. § 1003.2(c)(3)(ii); *see also Matter of C-W-L-*, 24 I&N Dec. 346 (BIA 2007); *Yuen Jin v. Mukasey*, 538 F. 3d 143 (2d Cir. 2008).

   However, there is an interplay between changed personal circumstances and changed country conditions in the motions context: Courts have held that when considering an untimely motion to reopen, the Board must consider changed country conditions as they relate to a change in the alien's personal circumstances (if the alien shows that the change in personal circumstances is now relevant to a claim of persecution because of a change in country conditions, then the untimely motion to reopen can be granted). *See, e.g., Shu Han Liu v. Holder*, 718 F.3d 706, 709-13 (7th Cir. 2013) (where the court found that the Board had erred in not properly analyzing the documentary evidence, which it concluded did establish changed country conditions – China had

[7] *See Linares-Urrutia v. Sessions*, 850 F.3d 477 (2d Cir. 2017) (stating that in light of *Brand X*, *Matter of F-P-R-*, 24 I&N Dec. 681 (BIA 2008), trumps the Second Circuit's case *Joaquin-Porras v. Gonzales*, 435 F.3d 172 (2d Cir. 2006), as to the definition of "last arrival" and noting that the meaning of "arrival" and "last arrival" would benefit from clarification by Congress). The Board had rejected the Second Circuit's holding in *Joaquin-Porras* and had held that the term "last arrival" should be given its "natural and literal meaning, i.e., the alien's most recent arrival in the United States from a trip abroad." *Matter of F-P-R-*, *supra*, at 683-84.

become more strict about religion – along with the respondent's conversion to Christianity while living in the US (which amounted to a change in personal circumstances)); *compare with En Gao v. Holder*, 721 F.3d 893, 895 (7th Cir. 2013) (where the Court again found that conversion to Christianity here in the U.S. accompanied with an appreciable deterioration of treatment towards Christians in China could form the basis to reopen an untimely motion to reopen, but that the respondent had not met his burden of showing a deterioration of treatment of Christians, or i.e., he had not shown changed country conditions with sufficient evidence).

b. "Extraordinary circumstances"—non-exhaustive list in regulations includes unaccompanied minor, ineffective assistance of counsel (or notario), serious illness or mental or physical disability, certain types of lawful status, etc. 8 C.F.R. § 1208.4(a)(5)(i)-(vi); *Matter of Y-C-*, 23 I&N Dec. 286 (BIA 2002)(unaccompanied minor).

Note: for either exception, must file within a reasonable amount of time once exception is established. The rule of thumb is anything over 6 months would not be considered reasonable. *See Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010) (noting that supplementary Information to the interim and final rules implementing IIRIRA indicated that an alien should file the asylum application as soon after the deadline as practicable).

Note: the statute (at section 208(a)(2)(E)) exempts outright unaccompanied minors from the 1-year bar. This provision and the regulation providing an exemption for late filing are not mutually exclusive; the statutory exemption operates so long as the person is currently an unaccompanied child, and the regulatory provision operates as an exemption even after the individual is no longer a minor if he or she files an asylum application within a reasonable amount of time.

2. Firm resettlement[8]—INA § 208(b)(2)(A)(vi); 8 C.F.R. § 1208.15

[8] The former regulations, repealed in 2001, barred applicants from asylum if they had found a "safe haven" in a third country before applying for asylum in the U.S. *See Tandia v. Gonzales*, 437 F.3d 245, 246 (2d Cir. 2006); former 8 C.F.R. § 208.14(e) (effective January 4, 1995, to April 1, 1997); former 8 C.F.R. § 208.13(d) (effective April 1, 1997, to January 5, 2001).

Occasionally, circuit courts have used the term "safe haven" in reference to the firm resettlement bar under 8 C.F.R. § 208.15. *See, e.g.*, *Elzour v. Ashcroft*, 378 F.3d 1143, 1152 (10th Cir. 2004); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1138 (9th Cir. 2004). The Fourth Circuit has suggested, in an unpublished decision, that the Board consider on remand whether "safe haven" is still a viable discretionary factor in light of the repeal of this regulation. *Shantu v. Lynch*, 654 F. App'x 608 (4th Cir. 2016)

The earlier of the two regulations, former 8 C.F.R. § 208.14(e), which was in force from January 4, 1995 until April 1, 1997, stated that

a. Who has the burden of proof?

DHS has initial burden to make a prima facie showing of an offer of firm resettlement by presenting direct evidence of an alien's ability to stay in a country indefinitely.

- The federal courts of appeals that have addressed firm resettlement have adopted two approaches: the Third, Seventh, and Ninth Circuits have adopted the "direct offer" approach, and the Second and Fourth Circuits have adopted the "totality of the circumstances" approach *Matter of A-G-G-*, 25 I&N Dec. 486, 495 (BIA 2011). The "direct offer" approach requires that the DHS present direct or circumstantial evidence that the respondent received an offer of some type of permanent residence from the government of a third country. *See Maharaj v. Gonzales*, 450 F.3d 961 (9th Cir. 2006); *Diallo v. Ashcroft*, 381F.3d 687 (7th Cir. 2004); *Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001). The "totality of the circumstances" approach considers evidence of a direct offer of firm resettlement as only one factor to be considered with other, non-offer-based, "indirect evidence."

  Matter of A-G-G-, *supra*, at 495-96 (citing *Sail v. Gonzales*, 437 F.3d 229 (2d Cir. 2006); *Mussie v. U.S. INS*, 172 F.3d 329 (4th Cir. 1999)). The remaining circuits have not adopted an explicit approach as to firm resettlement. However, both approaches place the initial burden on the DHS, allow for direct and indirect evidence of an offer, and allow for consideration of evidence submitted by the respondent to rebut the DHS's evidence. *Matter of A-G-G-*, *supra*, at 495-96. The burden-shifting framework laid out in *Matter of A-G-G-*, *supra*, is consistent with both approaches.

b. Who has the burden of proof?

> [a]n application from an alien may be denied in the discretion of the Attorney General if the alien can and will be deported or returned to a country through which the alien traveled en route to the United States and in which the alien would not face harm or persecution and would have access to a full and fair procedure for determining his or her asylum claim in accordance with a bilateral or multilateral arrangement with the United States governing such matter.

However, this earlier regulation had no practical effect because there were no such bilateral or multilateral agreements. *See* 59 Fed. Reg. 62284, 62296 (Dec. 5, 1994); *Tandia*, 437 F.3d at 246 n.2.

The latter of the two regulations, former 8 C.F.R. § 208.13(d), was in force from April 1, 1997, until it was repealed on January 5, 2001. *See* 65 Fed. Reg. 76121 (Dec. 6, 2000). It provided that "an asylum application may be denied in the discretion of the Attorney General if the alien can be removed to a third country which has offered resettlement and in which the alien would not face harm or persecution," thus removing the requirement for a bilateral or multilateral agreement. *See* 62 Fed. Reg. 10312, 10342 (Mar. 6, 1997); *Tandia*, 437 F.3d at 247.

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- Asylum applicant can rebut evidence of an offer of firm resettlement by showing by a preponderance of the evidence that the offer has not been made or that the applicant's circumstances would render him/her ineligible for such an offer of permanent residence.

- Evidence that permanent resident status is available to an alien under the law of the country of proposed resettlement may be sufficient to establish a prima facie showing of an offer of firm resettlement, and a determination of firm resettlement is not contingent on whether the alien applies for that status. *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011); *see also Makadji v. Gonzales*, 470 F.3d 450, 455 (2d Cir. 2006) (noting that many courts have "assumed that the government's burden can be satisfied without need to show a formal or express 'offer,' if the circumstances of the person's existence in a country demonstrate that the person was effectively accepted by the nation as a permanent resident").

- Facially valid permit to reside in a country equals "prima facie" evidence of an offer of firm resettlement. *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664

(BIA 2012).

- *Matter of A-G-G-, supra*, provides a four-step framework for making firm resettlement determinations:

  a. The DHS bears burden of presenting prima facie evidence of offer of firm resettlement. *See* 8 C.F.R. § 1240.8(d). The DHS should first secure and produce direct evidence but may use indirect evidence if direct evidence is unavailable. The evidence has to "indicate" that the mandatory bar to relief "may apply." Direct evidence may include a passport, a travel document, or evidence of refugee status. Indirect evidence may include immigration laws or refugee process in country of proposed resettlement and length of alien's stay in third country. *See Jin Yi Liao v. Holder*, 558 F.3d 152 (2d Cir. 2009) (applying a "totality of the circumstances" approach to determining whether DHS met its burden)

  b. Alien can rebut the DHS's prima facie evidence of offer of firm resettlement by showing by a preponderance of the evidence that such offer has not been made or that s/he would not qualify for it. *See Gonzales,* 421 F.3d 493, 497 (7th Cir. 2005). The burden only shifts to the respondent once DHS has produced sufficient evidence to meet its burden. *Shi Hwa She v. Holder*, 629 F.3d 958, 962 (9th Cir. 2010); *see also, e.g.*, *Tchitchui v. Holder*, 657 F.3d 132, 135 (2d Cir. 2011); *Firmansjah v. Gonzales*, 424 F.3d 598, 602 (7th Cir. 2005); *Abdille v. Ashcroft*, 242 F.3d 477, 491 (3d Cir. 2001).

  c. The IJ will consider the totality of the evidence presented by the parties to determine whether alien has rebutted the DHS's evidence of offer of firm resettlement.

  d. If IJ finds alien firmly resettled, then burden shifts to alien to establish exception to firm resettlement applies by a preponderance of the evidence. 8 C.F.R. §§ 1208.15(a)-(b).

     - "Necessary consequence" exception at 8 C.F.R. § 1208.15(a), which states that the individual's entry into that country was a necessary consequence of flight from persecution, he/she remained only as long as necessary to arrange further travel, and did not establish significant ties in that country. *See Ramos Lara v. Lynch,* 833 F.3d 556 (5th Cir. 2016); *Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012).

     - "Restrictive conditions" exception at 8 C.F.R. § 1208.15(b) which provides and exception if the conditions in the individual's residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she

was not in fact resettled. *See Matter of D-X- & Y-Z-*, 25 I&N Dec. 664 (BIA 2012); *cf. Camposeco- Montejo v. Ashcroft,* 384 F.3d 814 (9th Cir. 2004).

Note that an applicant who has been firmly resettled in a third country may be granted asylum if he has a WFF in that third country. *Siong v. INS*, 376 F.3d 1030, 1040 (9th Cir. 2004).

e. The federal courts of appeals have rejected claims that a fraudulently obtained immigration status should undercut a finding of firm resettlement. *See Su Hwa She v. Holder*, 629 F.3d 958, 962-64 (9th Cir. 2010); *Firmansjah v. Gonzales*, 424 F.3d 598 (7th Cir. 2005); *Salazar v. Ashcroft*, 359 F.3d 45, 51 (1st Cir. 2004); *cf. Matter of Ayala*, 22 I&N Dec. 398 (BIA 1998).

3. Safe Third Country Agreement —INA § 208(a)(2)(A); 8 C.F.R. § § 1208.4(a)(6), 1240.11(g)

In effect, the agreement with Canada requires persons seeking refugee protection to make a claim in the first country in which they arrive (either U.S. or Canada), unless they qualify for an exception under 8 C.F.R. § 208.30(e)(6)(i)-(iii).

4. Frivolous Asylum Claims—INA § 208(d)(6); 8 C.F.R. § 1208.3(c)(5)

a. Notice required of consequences of knowingly filing a frivolous application for asylum under section 208(d)(6) of the Act—INA § 208(d)(4)(A).

b. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007) (before making a "frivolous" finding, an IJ must provide alien with an opportunity to explain deliberately fabricated information in asylum request).

c. Frivolous finding does not preclude applicant from seeking withholding of removal—8 C.F.R. § 1208.20.

d. *Matter of M-S-B-*, 26 I&N Dec. 872 (BIA 2016) (holding that a time-barred asylum application may be deemed frivolous pursuant to section 208(d)(6) of the Act where the applicant deliberately misrepresents his or her date of entry when it is material to the threshold question of the timeliness of the application).

e. Circuit courts generally require evidence of deliberate fabrication to uphold finding of frivolousness. *See, e.g., Siddique v. Mukasey*, 547 F.3d 814, 815 (7th Cir. 2008) (petitioner confessed that he had lied about police murdering his family by forging police and autopsy reports); *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005) (medical records submitted by the alien were dentified by the hospital as fraudulent); *Selami v. Gonzales*, 423 F.3d 621, 626– 27 (6th Cir. 2005) (documents provided by the alien were

clear forgeries when compared to true copies of the originals); *Barreto–Claro v. U.S. Atty. Gen*., 275 F.3d 1334, 1339 (11th Cir. 2001) (alien admitted he lied in his prior asylum application).

- An adverse credibility determination based on discrepancies between alien's account and documentary evidence alone is insufficient to support a frivolous finding. *Wang v. Lynch*, 845 F.3d 299, 303 (7th Cir. 2017). Previous Asylum Application – INA §§ 208(a)(2)(C)-(D)

5. Previously filed asylum application -- Where applicant previously applied for and was denied asylum, unless changed circumstances exist which materially affect his/her eligibility for asylum.

    a. Once there is a final order, applicant can only file a motion to reopen, and only under the "changed country conditions" if beyond 90-day MTR deadline.

6. Reinstated removal orders – Aliens with reinstated removal orders are ineligible to apply for asylum – *see e.g., Lara-Aguilar v. Sessions*, 887 F.3d 1225 (4th Cir. 2018); *Garcia v. Sessions*, 856 F.3d 27 (1st Cir. 2017); *Cazun v.v. Att'y Gen. of U.S*., 856 F.3d 249(3d Cir. 2017); *Perez-Guzman v. Lynch*, 835 F.3d 1066 (9th Cir. 2016); *Jimenez-Morales v. U.S. Att'y Gen*., 821 F.3d 1307 (11th Cir. 2016); *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015); *Herrera-Molina v. Holder*, 597 F.3d 128 (2d Cir. 2010).

B. Bars to Asylum and Withholding

1. Persecutor

    a. INA §§ 208(b)(2)(A)(i), 241(b)(3)(B)(i) = "ordered, incited, assisted or otherwise participated in persecution" on account of a protected ground.

    b. Evidence: even where IJ makes an adverse credibility finding, the record may contain enough evidence to trigger the persecutor bar. *See, e.g., Munyakazi v. Lynch*, 829 F.3d 291 (4th Cir. 2016) (holding that the respondent, a native and citizen of Rwanda, ordered, incited, assisted, or otherwise participated in persecution of others on account of their Tutsi ethnicity, and thus was statutorily ineligible for asylum and withholding of removal under the persecutor bar, in light of interviews by DHS investigators in Rwanda with survivors of massacre in the respondent's home village indicating that he was present and assisted in the massacre, internal inconsistencies in the respondent's testimony regarding his activities around time of the massacre, and contradictory testimony from the respondent's witnesses).

    c. There is a limited duress exception to the persecutor bar. *See Matter of Negusie*, 27 I&N Dec. 347 (BIA 2018) (holding that to meet the minimum threshold requirements of the duress defense to the persecutor bar, an

applicant must establish by a preponderance of the evidence that (1) he acted under an imminent threat of death or serious bodily injury to himself or others; (2) he reasonably believed that the threatened harm would be carried out unless he acted or refrained from acting; (3) he had no reasonable opportunity to escape or otherwise frustrate the threat; (4) he did not place himself in a situation in which he knew or reasonably should have known that he would likely be forced to act or refrain from acting; and (5) he knew or reasonably should have known that the harm he inflicted was not greater than the threatened harm to himself or others).

2. Particularly Serious Crime (PSC)

   a. Requires a conviction. INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B)(ii).

      NOTE: *All* aggravated felonies are considered per se to trigger PSC bar for asylum. INA § 208(b)(2)(B)(i). For purposes of withholding, only aggravated felonies for which applicant was sentenced to an aggregate of at least 5 years will per se trigger the PSC crime bar. INA § 241(b)(3)(B)(iv). However, aggravated felony/felonies with less than 5-year aggregate sentence may still be determined to be "PSC" per regulations and case law.

   b. Drug-trafficking aggravated felony is presumed to be "particularly serious"—*Matter of Y-L-, A-G- and R-S-R-*, 23 I&N Dec. 270 (A.G. 2002).

      NOTE: Narrow exception discussed in A.G.'s decision for "extenuating circumstances"

      NOTE: This presumption only applies to drug trafficking *aggravated felonies*. If an alien were convicted of a drug trafficking crime that does not constitute an aggravated felony, the presumption would not apply.

   c. If a conviction is not per se a PSC, adjudicators should consider the *Frentescu* factors:[9]

      - Nature of the offense – i.e. do the elements of the offense make it a potential PSC
      - Type of sentence imposed
      - Circumstances and underlying facts of the conviction.

        See. e.g. Valerio-Ramirez v. Sessions, 882 F.3d 289, 298-300 (1st Cir. 2018) (determining that evidence supported the BIA's ruling that the petitioner's conviction for aggravated identity theft, which went beyond "merely seeking employment," went on for more than a decade, and

[9] *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982), originally articulated these factors, plus the additional factor of danger to the community, which Board case law later determined was not a separate determination: instead, anyone convicted of a PSC is considered a danger to the community. *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986).

resulted in a severe prison sentence and an order to pay a considerable amount in restitution, was a PSC*); Nethagani v. Mukasey,* 532 F.3d 150 (2d Cir. 2008) (finding that Board did not abuse its discretion in concluding that conviction for reckless endangerment, which involved firing a pistol into the air, was a PSC); *Arbid v. Holder*, 700 F.3d 379 (9th Cir. 2012) (finding that Board did not abuse discretion in determining that that the respondent's involvement in a complex scheme to defraud victims of nearly $2 million was a PSC).

NOTE: The Ninth Circuit still treats *Frentescu* as defining the "applicable legal standard" in PSC cases not governed by the aggravated-felony-plus-5-year- sentence or *Matter of Y-L-, A-G- and R-S-R-* presumptions. *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1077 (9th Cir. 2015). In circuits other than the Ninth Circuit, you may cite to *Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007), for the PSC factors.

Once elements of offense bring it within the ambit of a PSC (potentially), then all reliable information may be considered (including, but not limited to the record of conviction and sentencing information)—*Matter of N-A-M-*, 24 I&N Dec. 336 (BIA 2007).

d. *Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007), recognized that in some instances, the Board may find some crimes to be PSCs by looking only at the elements of the offense. **HOWEVER**, the Ninth Circuit has rejected this. *See Blandino-Medina v. Holder*, 712 F.3d 1338, 1348 (9th Cir. 2013) (holding that the Board erred in holding that lewd and lascivious acts with a child under 14 years old in violation of Ca. Penal Code § 288(a) is a PSC *per se*).

e. An alien's mental health as a factor in a criminal act falls within the province of the criminal courts and is **NOT** considered in assessing whether the alien was convicted of a "PSC" for immigration purposes. *Matter of G-G-S*, 26 I&N Dec. 339 (BIA 2014).

NOTE: Ninth Circuit explicitly does **not** accord deference to *Matter of G-G-S*. *See Gomez-Sanchez v. Sessions*, 887 F.3d 893 (9th Cir. 2018) (holding that in determining whether a conviction constitutes a particularly serious crime, the Agency must take all reliable, relevant information into consideration, including "the defendant's mental condition at the time of the crime, whether it was considered during the criminal proceedings or not.")

f. Child pornography may be a PSC, but this is a developing issue. *Matter of R-A-M-*, 25 I&N Dec. 657 (BIA 2012) (considering the nature of the crime and the individual factual circumstances of the conviction in concluding the respondent's state conviction for child pornography was a PSC

barring him from withholding of removal), *but see Chavez-Solis v. Lynch*, 803 F.3d 1004 (9th Cir. 2015) (concluding that a conviction under the same state statute for child pornography was not an aggravated felony and remanding for further proceedings).

3. Serious non-political crime

   a. No conviction required. *See* INA §§ 208(b)(2)(A)(iii), 241(b)(3)(B)(iii).

   b. Applicable if serious reasons to believe applicant **committed** serious non-political crime outside the U.S. before arriving in the U.S. INA §§208(b)(2)(A)(iii), 241(b)(3)(B)(iii).

      Must balance the seriousness of the criminal act(s) against the political aspects of the conduct. *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012) (finding that the level of criminal conduct in this case weighed against the political nature of the conduct, constituting a serious non-political crime, where the respondent was in a group that on five or six occasions posed as members of an opposing political party and burned passenger cars and buses, threw stones, and threw merchandise off tables in marketplace in an attempt to taint the image of political opponents).

4. Security threat

   Need reasonable grounds to believe danger to security of the U.S. *See* INA §§208(b)(2)(A)(iv), 241(b)(3)(B)(iv).

5. Terrorist bars (apply to both asylum and 241(b)(3) withholding) – INA §§ 208(b)(2)(A) and (B), 241(b)(3)(B) (last sentence)[10]

   1. Section 212(a)(3)(B)(i)-(iv) defines, among other things, terrorist activity, membership in terrorist organizations and what constitutes "engaging in terrorist activity")

   2. 3 Tiers of Terrorist Organizations – defined at INA § 212(a)(3)(B)(vi)

      a. Tier I – Foreign Terrorist Organization ("FTO") – designated under INA § 219; e.g., ISIL, Al-Qua'ida, Al-Shabaab, Boko Haram

      b. Tier II – Terrorist Exclusion List ("TEL") organization – designated by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security; e.g., Revolutionary United Front, Lord's Resistance Army.

      c. Tier III – defined as a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (IV)."

[10] **NOTE:** The bars in 241(b)(3)(B) apply to withholding under both 241(b)(3) and the CAT. *See* 8 C.F.R. §1208.16(d)(2).

No formal list - e.g., Jammu Kashmir Liberation Front, Oromo Liberation Front, and Eritrean People's Liberation Front. *See e.g. S.A.B. v. Boente,* 847 F.3d 542 (7th Cir. 2017).

Note: An entity cannot be deemed a Tier III terrorist organization absent a finding that its leaders authorized terrorist activity committed by its members. *See Uddin v. Att'y Gen. of the U.S.*, 870 F.3d 282, 290 (3d Cir. 2017); *Zumel v. Lynch*, 803 F.3d 463, 474 (9th Cir. 2015) (citing approvingly *Matter of S-K-*, 936, 941 (BIA 2006), for that proposition).

For more information as to the tiers of terrorist organizations, *see* Denise Bell, *Tier III Terrorist Organizations: The Role of the Immigration Court in Making a Terrorist Designation*, 10 (no. 5) Imm. L. Advisor 1 (June 2016).

3. Who has the burden of proof?

   The DHS bears the initial burden of proof of showing that the "evidence indicates" that the terrorist bar "may apply." 8 C.F.R. § 1240.8(d); *see Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006); *Budiono v. Lynch*, 837 F.3d 1042, 1047-49 (9th Cir. 2016); *Viegas v. Holder*, 699 F.3d 798, 801-02 (4th Cir. 2012).

   Note: In a case interpreting the persecutor bar, the Board has recently interpreted this portion of the regulations to "necessarily create a less onerous standard than the preponderance of the evidence showing" that is required when the respondent has the burden of proof to show the bar does not apply. *Matter of M-B-C-*, 27 I&N Dec. 31, 37 (BIA 2017). So, where the record contains some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial based on a bar to relief may apply, the burden shifts to the R who then has the burden of proof to prove by a preponderance of the evidence that such grounds do not apply. *Id.*

   If the DHS meets its burden, then the alien has the burden of showing by a preponderance of the evidence that the terrorist bar does not apply. 8 C.F.R § 1240.8(d).

4. Knowledge exemption (applies only to Tier III organizations) – the respondent can demonstrate by clear and convincing evidence that he did not know, and should not reasonably have known, that the organization was a terrorist organization. *FH-T v. Holder*, 723 F.3d 833, 839 (7th Cir. 2013).

5. "Material support" issue from § 212(a)(3)(B)(iv)(VI) arises: Individual who lends "material support" to terrorist organization is barred from asylum and withholding; what qualifies as material support can be minimal (e.g., $1100 over a 11-month period, *Matter of S-K-,* 23 I&N Dec. 936 (BIA 2006); *see also Matter of S- K- III,* 24 I&N Dec. 475 (BIA 2008); *Jabateh v. Lynch*, 845 F.3d 322 (7th Cir. 2017) (affirming the BIA's determination that the alien's provision of sporadic and infrequent interpreter services to a terrorist organization member with

regard to medical appointments and social errands, i.e., for non-terrorist activities, constituted "material support," thus barring the alien from asylum and withholding of removal); *see also Hussain v. Mukasey*, 518 F.3d 534 (7th Cir. 2008) (holding that inference that alien's organization authorized its members to commit acts of armed violence was "inescapable," and therefore court would sustain BIA's determination for removal for material support of terrorism); *Kahn v. Holder*, 766 F.3d 689 (7th Cir. 2014) (finding that alien's peaceful political activities provided material support for terrorist organization); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (noting that "material support meant to promote peaceable, lawful conduct can further terrorism").

"Material support" is defined as an act that has a logical and reasonably foreseeable tendency to promote, sustain, or maintain a terrorist organization, even if only to a di minimis degree. *Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018).

6. No Duress Exception for Contributing Material Support. *Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016); *see also Ay v. Holder,* 743 F.3d 317 (2d Cir. 2014).

   The Third, Fourth, Ninth, and Eleventh Circuits have held that the material support bar does not include an implied exception for aliens who provided material support to a terrorist organization under duress. *See Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 224 (3d Cir. 2015); *Annachamy v. Holder*, 733 F.3d 254, 267 (9th Cir 2013), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014); *Alturo v. U.S. Att'y Gen.*, 716 F.3d 1310, 1314 (11th Cir 2013); *Barahona v. Holder*, 691 F.3d 349, 355 (4th Cir. 2012). For more information, *see* Chaya M. Citrin, *One Person's Freedom Fighter, Duress, and the Terrorism Bar*, 10 (no. 7) Imm. L. Advisor 1 (Sept.-Oct. 2016).

   Note: Waiver for terrorist bar pursuant to section 212(d)(3)(B)(i) of the Act - can only be granted by the DHS and certain criteria must be met, including that alien would have been granted asylum or withholding "but for" the terrorist bar; therefore, it is very important that IJ and the Board do not merely deny relief based on the bar, but also run through the analysis to determine whether alien is eligible for relief and state on the record that such relief would have been granted "but for" the terrorist bar.

7. Note also that the terrorist bar applies retroactively to an alien's material support of a Tier III organization. *See Bojnoordi v. Holder*, 757 F.3d 1075, 1077 (9th Cir. 2014).

VII. Recent Precedent on Asylum and Withholding of Removal

The following examples are cases of evolving or emerging case law.

A. Inter-Proceeding Similarities:

This occurs when the evidence from one application is substantially similar, or identical, to another application. *See Matter of R-K-K-*, 26 I&N Dec. 658 (BIA 2015) (holding that the IJ should give the respondent meaningful notice of the similarities that are considered to be significant; provide the respondent a reasonable opportunity to explain the similarities; and consider the totality of the circumstances in making the credibility determination); *Wang v. Holder*, 824 F.3d 587 (6th Cir. 2016) (holding that where the IJ notified the respondent of the similarities between his and two other asylum applications and gave him an opportunity to explain them, but he did not, the respondent could not claim that his failure to explain the similarities resulted from a lack of notice or from a lack of other procedural safeguards).

Factors that make similarities more significant may include:

1. A large number of similarities;
2. Identical elements; and
3. Inclusion of additional non-essential material in both statements.

Possible explanations for similarities may include:

1. Mere coincidence;
2. Use of standardized templates;
3. Use of the same translator/transcriber; or
4. The respondent was an innocent victim of plagiarism by another person.

In *Matter of R-K-K-*, the Board specifically noted that considering similar statements from different proceedings must be done in a manner consistent with the confidentiality concerns set out at 8 C.F.R. § 1208.6, which provides that information from asylum applications or credible fear/reasonable fear determinations shall not be disclosed without the written consent of the applicant, except as permitted by the regulations or as directed by the Attorney General. *See Matter of R-K-K-*, 26 I&N Dec. at 661-63, nn. 3-4. In that case, the Board found that the confidentiality requirements had been met because the respondent's brother waived the confidentiality protections at 8 C.F.R. § 1208.6. *Id*. at 663, n.4. The Board also stated that it declined to address what procedural protections would be required if similar documents from different proceedings were compared absent a confidentiality waiver. *Id*. For more information on document similarities, *see* Roberta Oluwaseun Roberts, *Tackling Fraud Without Trampling Due Process: A Procedural Framework for Considering Document Similarities in Immigration* Proceedings, 11 (no. 2) Imm. L. Advisor 1 (Feb. 2017).

B. Mental Competency and Credibility:

When the respondent cannot participate in the proceedings because of a lack of competency, the question becomes whether sufficient relevant information can otherwise be obtained to allow challenges to removability and claims for relief to be presented in the absence of reliable testimony from the respondent. *Matter of M-J-K-*, 26 I&N Dec. 773, 776 (BIA 2016). Additionally, the focus should be on the objective component of the applicant's claim, not his or her subjective fear of harm. *See Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015) (noting that "[these] scenarios need to be assessed on a case-by-case basis, but where a mental health concern may be affecting the reliability of the applicant's testimony, the [IJ] should, as a safeguard, generally accept that the applicant believes what he has presented, even though his account may not be believable to others or otherwise sufficient to support the claim"). The Board reviews de novo the IJ's determination regarding which safeguards to implement. *See Matter of M-J-K-*, 26 I&N Dec. at 775.

C. New Asylum Applications: *See Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015). Consider the following in your analysis:

1. First ask, is it a "new" application? (Does it present a previously unraised basis for relief or is it predicated on a new or substantially different factual basis?)
2. If the second application is a new application, the later filing date controls for purposes of determining whether the REAL ID Act applies.
3. If R has filed more than one application, and the later application is deemed to be a new application, the filing date of the later application controls for purposes of determining whether the 1-year statutory time bar applies

   See also Barragan-Ojeda v. Sessions, 853 F.3d 374 (7th Cir. 2017) (upholding BIA's reliance on *M-A-F-* in rejecting the alien's argument of imputed sexual orientation, and thus, no new application).

D. Abandoned Applications:

1. Abandonment based on biometrics noncompliance: *See Matter of D-M-C-P-*, 26 I&N Dec. 644 (BIA 2015) (holding that an asylum applicant must receive proper notice on the record of the biometrics requirements, which includes:
   a. advising the applicant on the record of need to provide biometrics and instructions submitting information;
   b. informing the applicant of the deadline for complying with the biometrics requirements; and
   c. informing the applicant of the consequences of noncompliance, including possibility of abandonment).

2. Abandonment based on untimely application: *See Matter of R-R-*, 20 I&N Dec. 547, 549 (BIA 1992) (noting that the "Board has long held that applications for benefits under the Act are properly denied as abandoned when the alien fails to timely file them); *Matter of Islam*, 25 I&N Dec. 637, 642 (BIA 2011) (determining that an incomplete application is treated as untimely filed).

3. Abandonment based on untimely documents: *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 266 (BIA 2010); *Matter of E-F-H-L-*, 26 I&N Dec. 319, 323 (BIA 2014). *Compare Casares-Castellon v. Holder*, 603 F.3d 1111, 1113 (9th Cir. 2010) (noting that the plain language of 8 C.F.R. § 1003.31(c) does not permit deeming timely filed application abandoned for failure to file supplemental documents within specified time) *with Bropleh v. Gonzales*, 428 F.3d 772, 779 (8th Cir. 2005) (concluding that the applicant abandoned his adjustment application by failing to present any evidence in support of his application) .

E. The Use of Overseas Investigation Reports as Evidence:

See Angov v. Lynch, 788 F.3d 893 (9th Cir. 2015). The Ninth Circuit reaffirmed its position as the sole circuit on the side of a split concerning the use of overseas investigation reports as fact-checking mechanisms in asylum cases, by denying the petition for hearing en banc from *Angov v. Holder*, 736 F.3d 1263 (9th Cir. 2013). The circuits are split over whether these reports, which are often short on details, are prepared for the purpose of litigation, and do not contain the identity of the preparer, are admissible as evidence against an asylum seeker. The Third, Fourth, Sixth, and Eighth Circuits have found the reports are inadmissible because they violate an alien's right to due process.